# UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES

WESTERN STATES ENVELOPE COMPANY

and

Case 30-CA-18296

GEORGE UTLEY, an individual

Anita C. O'Neil, Esq., for the General Counsel.
Robert Pettit (Petue and Stocking S.C.),
Milwaukee, Wisconsin, for the Respondent.
George Utley, Milwaukee, Wisconsin, Charging Party.

#### **DECISION**

#### Statement of the Case

EARL E. SHAMWELL JR., Administrative Law Judge. This case was tried by me on October 14 and 15, 2009, in Milwaukee, Wisconsin, pursuant to an original charge filed by the Charging Party, George Utley, on March 24, 2009, against Western States Envelope Company (the Respondent); Utley filed an amended charge against the Respondent on July 21, 2009. The Regional Director for Region 30 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing (complaint) on July 31, 2009.

The complaint essentially alleges that sometime in late January 2009, the Respondent, through a supervisor, threatened employees with unspecified reprisals if they sought assistance from their union representative regarding working conditions, and interrogated the employees as to whether they had sought assistance from the Union regarding working conditions, all in violation of Section 8(a)(1) of the National Labor Relations Act (the Act.) The complaint further alleges that on February 26 and March 4, 2009, the Respondent laid off and terminated, respectively, Utley because of his union activities and support in violation of Section 8(a)(1) and (3) of the Act.

On August 5, 2009, the Respondent filed timely its answer essentially denying the commission of any unfair labor practices and asserting certain affirmative defenses.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, <sup>1</sup> I make the following

<sup>&</sup>lt;sup>1</sup> The Charging Party did not file a brief.

## Findings of Fact

#### I. Jurisdiction

The Respondent, Western States Envelope Company, a corporation with an office and a facility in Butler, Wisconsin, is engaged in the business of manufacturing envelopes. During the past calendar year, Western States Envelope in conducting its business operations sold and shipped goods and materials in excess of \$50,000 directly to customers located outside the State of Wisconsin. The Respondent admits, and I find and conclude, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent further admits, and I find and conclude, that the Employees of Western States Envelope Company Union is a labor organization within the meaning of Section 2(5) of the Act.

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## II. Background and Other Undisputed Factual Matters

The Respondent is a family owned and operated company that has been making envelopes and labels for around 100 years. The Company employs approximately 650 employees in about 5 administrative divisions, with the main manufacturing activity taking place at the Butler, Wisconsin facility which employs about 28 manufacturing, production, and maintenance employees.

At Butler, the Respondent employs three categories of workers specifically involved in the making of envelopes—adjusters, setup operators, and machine operators; the adjusters possess the highest level of skill sets among these classifications and are able to both set up and operate the envelope making machines. The machine operators are the least skilled of these workers, and the setup operators fall somewhere between the two in terms of the skills necessary to produce the envelopes.

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The Respondent's envelopes are produced by special machines that either make envelopes described as open end or open side,<sup>2</sup> and the manufacturing of these are administratively assigned to the Respondent's folding department, which is further divided into open end and open side departments which employ the three types of production and manufacturing as stated above.

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The Respondent's aforesaid manufacturing, production, and maintenance employees are represented by an unaffiliated independent union, the aforementioned Western States Envelope Employees Union. The Union is funded by voluntary donations and does not assess its members any dues. The Union is governed by an executive board comprised of a president, vice president, secretary, treasurer, and three trustees.

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The Respondent and the Union are signatories to a collective-bargaining agreement that is in effect until May 1, 2010.<sup>3</sup> Pursuant to this agreement, the Union's executive board and the

 $<sup>^2</sup>$  Open end envelopes are characteristically typical a "9 x 12" size that open on one end and are used to deliver catalogs or unfolded sheets of paper. Open side envelopes are the typical commercial-type mailing envelope that opens on the top side.

<sup>&</sup>lt;sup>3</sup> The current collective-bargaining agreement is contained in GC Exh. 8, the effective dates of the agreement are April 29, 2007, through May 1, 2010.

Respondent's management team comprised of the Company's upper management<sup>4</sup> meet periodically to discuss and consider matters pertinent to the business, including the hiring, layoff, and firing of employees, contract disputes and grievances, and the general state of the Company.

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Sometime in the spring of 2008, the Respondent's business began a downturn and by early September of that year, there was a precipitous falling off of business—around 20–35 percent—such that the Company over a period was forced to eliminate about 127 employees, with 73 positions alone being eliminated at the Butler plant; this was an approximate 18-percent reduction in the Butler work force. By the end of 2008 and into 2009, the Respondent decided to reduce the work force by way of a permanent layoff program as opposed to its customary voluntary layoff procedure wherein employees could voluntarily agree to be laid off in order to keep the most people working. Accordingly, between November 17, 2008, and around June 8, 2009, the Respondent laid off a number of its open end employees.<sup>5</sup> During this period and with regard to the Respondent's decision to make layoffs permanent, the company management team and the Union's executive board met periodically to discuss this issue as well the issue of the Company's economic condition and the effects thereof on the work force.

On or about February 20, 2009, George Utley, an adjuster, was laid off by the Respondent and on March 4, 2009, he was permanently laid off; and at the time of the hearing he had not been recalled by the Company.

# III. The Alleged Unfair Labor Practices

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### A. The General Counsel's Witnesses

George Utley testified that he had been employed by the Respondent at the Butler facility as a production and maintenance employee—machine adjuster—in the open end folding department for about 9 years before his termination on March 4, 2009; Utley stated that he was a member of the Union during his time at Western States Envelope. Utley further stated that at the time of his termination he worked the third shift (10:30 p.m. to 6:30 a.m.) Sunday through Thursday, a shift he worked the entire time of his employment with the Company, except for an initial training stint on the first shift. Utley said that his supervisor for the last 5 years of his

employment was John Ricco, an admitted supervisor.

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By way of background, Utley described his job as essentially adjusting and maintaining the various envelope-making machines in the open end folding department, principally for the past 5 years on a machine called a BOE. At the time of his termination, Utley noted that on third shift, he worked with approximately 12–15 employees operating about 12 envelope-making machines in teams consisting of 2–1 adjuster and 1 operator as a general matter.

Turning to the events that he believed led to his termination, Utley stated that on October 11, 2008, he was involved in a motorcycle accident and suffered serious injuries that kept him out of work until January 11, 2009.

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<sup>&</sup>lt;sup>4</sup> The management team is comprised of the Respondent's president; the vice president of finance and operations, the Butler plant manager, and the director of human resources.

<sup>&</sup>lt;sup>5</sup> See GC Exh. 39, a compilation of layoffs for open end employees covering November 17, 2008, through June 8, 2009. This exhibit was prepared by the Respondent for litigation and as part of its efforts to comply with a subpoena duces tecum from the General Counsel.

Utley recalled that around the first week of February 2009, he ventured to the company break room, and another adjuster (an open side employee), whose name he did not know, warned him that it was not a good idea to stay in the break room because his supervisor, Ricco, was running adjusters out of the room and directing them back to their machines. Utley said he took the advice and simply turned around and returned to his work area.

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Utley testified later in that week, as his shift was ending and the first shift was commencing, he waited for Sharon Sellhausen, the union president and a first-shift employee, to arrive. Utley stated that when he saw her he called her over to his machine and there requested from her a copy of a letter or notice, posted he believed a year earlier, that dealt with the Company's adjuster break policy. According to Utley, Sellhausen noted that she was not serving as president during that time but would check the Union's records; Sellhausen also asked him why he wanted the information.

Utley testified that he thereupon told Sellhausen what he had been told by the open side employee earlier in the week, and it was his desire to follow the company break rules in the event he needed to take a break. Utley stated that he specifically mentioned to Sellhausen Ricco's alleged involvement in the matter.

According to Utley, Sellhausen said that she would consult the plant manager, Tom Bezoenik, about the matter and get back to him. Later (around 6:30 a.m.), according to Utley, Sellhausen told him that she had spoken to Bezoenik about the matter, but without mentioning his (Utley's) name, and Bezoenik had confirmed to her that adjusters were indeed entitled to breaks to avoid fatigue and accidents, as the machines are fast moving and have cutting blades. According to Utley, Sellhausen said that Bezoenik would ensure that all supervisors were aware of the policy.

Utley recalled that on the day following his discussion with Sellhausen, Ricco approached him early in the shift and asked him to come to the warehouse area to discuss a matter in private. Once there, according to Utley, Ricco told him that he had already discussed with two other (unnamed) persons the matter of adjuster breaks and had one more person to speak to. Ricco then asked him whether he had gone to the Union about the break issue. Utley testified that he told Ricco that indeed he was the one and that he (Ricco) did not have to talk to anyone else about the matter. Utley stated that he went on to tell Ricco that he was concerned about breaks and wanted to see the notice or letter in question and insisted that the adjusters were entitled to breaks. According to Utley, Ricco responded, saying that what happened regarding breaks and other adjusters was none of Utley's business that he did not need to be crying to the Union about the issue. Utley testified that he told Ricco that he could consult the Union about anything he desired and, while walking away, Ricco again said that he had no right to go crying to the Union. Utley stated that there was no other discussion with Ricco or other management about the break issue.

Utley stated that he was well aware of the slowdown in the Company's business during this time. He noted that for the week following his discussion with Ricco, the week of February 9, he and a number of other adjusters and operators on third shift were assigned to the second shift. Utley said that he was even assigned to an operator position.

Utley recalled that Jeff Burns, the second-shift supervisor, told him at the end of that first week that business had not picked up so he would remain on second shift; Utley said he told Burns that he would do whatever was necessary ("whatever you guys need").

Utley also stated that around this time, a fellow third-shift adjuster working the second shift, Andy Ritter, informed him that he (Ritter) was being reassigned to the third shift, but he wanted to remain on second-shift. According to Utley, Ritter asked him if he would mind switching assignments. Utley told him that he did not mind, and Ritter said that he would speak to the folding department head, Laura Theime, about the switch. According to Utley, the next day Theime told him that another adjuster with more seniority had requested to remain on second shift and asked him if he would mind going back to third shift. Utley said that he told Theime he would work any shift where he was needed. Accordingly, Utley said that he reported to third shift on February 15, a Sunday.

Utley related that on that night, Ricco approached him in the locker room and said, I see you whined your way back to 3<sup>rd</sup>." Utley said he countered, telling him that Ritter wanted to stay on second shift, that he had not whined his way back. According to Utley, Ricco simply said "whatever" and walked away.

Directing himself to his prior job performance over the time of his employment, Utley identified copies of his employee evaluations covering the period April 2000 though February 20, 2009, pointing out that he had received in each year at least a satisfactory evaluation<sup>6</sup> for his job performance. Utley stated that he met with Ricco in his office on February 19, 2009, to review his most recent evaluation covering the last year. According to Utley, Ricco specifically discussed only item #5 dealing with his analytical ability which Ricco said was not up to par. Utley said he told Ricco that he had not been given much by way of training or other opportunities to work on any machines other than the BOE 603 on which previously he worked, and given that fact he could not reasonably expected to be as proficient on the others. According to Utley, Ricco promised to give him additional time on the other machines to improve his proficiencies, but other than what was contained in the written evaluation nothing more was said about his performance. Utley specifically denied that Ricco said anything about his "attitude" or ability/willingness to take constructive criticism.<sup>7</sup>

Utley stated he reported for work the next day (February 20) and while he was working at his machine, at about 6:15 a.m., Ricco—all the while laughing—said, "Hey Dude, you're laid off next week and left the area. Utley said he said nothing in response but left the area and encountered his union representative, Mike Stelly, who asked why he was looking so upset. Utley said that he told Stelly of his prospective layoff as told to him by Ricco. According to Utley, Stelly expressed surprise and said that did not seem correct because adjusters, being in "short supply," were not to be laid off (because of the business slowdown). Stelly thought they should both speak with the department head, Theime, and Utley agreed to do so after the shift. Utley noted that at that time he did not tell Stelly of Ricco's laughing while telling him of his prospective layoff.

<sup>&</sup>lt;sup>6</sup> Utley's evaluations covering the period above are contained in GC Exhs. 2 and 36. Notably, the evaluation for 2000–2002 utilized a 5-point system with 5 being excellent, 4 above average, 3 average, 2 below average, and 1 poor. For the years 2003–2009, the evaluation form included a 3 point "expectations" system with categories graded as below, meets and exceeds expectations. These evaluations shall be discussed more at length later in the decision.

<sup>&</sup>lt;sup>7</sup> It should be noted that Utley's last evaluation is dated January 17, 2009, and signed by Ricco on that date. According to Utley, the evaluation was not presented to him for review until February 19, 2009, and his signature does not appear on the form. Utley could not explain why this happened. I note that the evaluation contains the initial RS (for Russ Schallert) and another set of initials and the date, February 20, 2009.

Utley said that he and Stelly met with Theime, and Stelly, doing most of the talking, told her that adjusters were not to be part of any layoffs. According to Utley, Theime said that he was the least senior adjuster on the BOE machines and there was not enough work to keep him on. Utley said that he asked Theime why he could not be returned to second shift as an operator and, further, whether management was angry with him out of an erroneous perception that he did not want to work on the second shift. According to Utley, Theime said that that had nothing to do with the Company's decision which had been made and was final. Utley stated he was subsequently laid off the following week of February 23.

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However, shortly after the meeting with Theime, Utley said that he and Stelly further discussed the matter and it was then that he told Stelly of Ricco's laughing about his layoff and Stelly, disapproving, said he would speak to Bezoenik about Ricco's unprofessional behavior. Stelly later called him at home and told him he had discussed Ricco's behavior with Bezoenik who agreed that it was inappropriate and that he would ensure that this did not happen again.

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Utley noted that while on layoff, employees were required to call in by Thursday regarding work availability for the next week and when he called in he was told by an employee, Danno, that business had not picked up and he would remain on layoff status. However, on March 4, Utley said he received a call from Russell Schallert, the human resources head, telling him that he was being terminated because of his "skill set," the (new) direction the Company was taking, and his "attitude." Utley said he questioned Schallert about his attitude, what this meant. According to Utley, Schallert said that he (Utley) apparently had some issues if someone tells him to do something. Utley said that he then requested of Schallert a face-to-face meeting with Bezoenik and Schallert said he would speak to the plant manager.

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Utley stated that after pondering the matter, he sent an email to Schallert requesting certain documentation, including his last five performance reviews, copies of all disciplinary actions, and information about the retirement plan.<sup>8</sup>

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Utley stated that he received a response from Schallert who said that he would provide the requested documentation, but that Bezoenik would not meet with him and that all future communications about his layoff should be addressed to the Union.<sup>9</sup>

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Utley said he did contact the Union and told Sellhausen of developments to date, including Schallert's response; Sellhausen advised him to contact Mark Lemberger, Western States Envelopes' president. Acting on Sellhausen's advice, Utley said he requested a meeting with Lemberger and on March 16, 2009, met with him, discussed his situation, and gave him a copy of a letter he had drafted to cover points he wanted to discuss with Lemberger at the meeting. According to Utley, Lemberger said that he would meet with Bezoenik, Ricco, and Schallert and later get back with him. Utley testified that Lemberger called him on March 19 and told him that he had met with these managers, whom he felt had acted properly, and that he would not be reinstated. Utley said he asked Lemberger why, if business was down and the

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<sup>&</sup>lt;sup>8</sup> Utley identified GC Exh. 3 as a copy of the email he sent to Schallert on March 5, 2008, but because of a transmission failure he had to send the email to human resources employee Marla Holman, who forwarded it to Schallert.

<sup>&</sup>lt;sup>9</sup> Utley identified GC Exh. 4 as a copy of the email received from Schallert.

<sup>&</sup>lt;sup>10</sup> See GC Exh. 5, a copy of the letter Utley said he left with Lemberger.

Company was engaging in cost-cutting, did the Company hire two new adjusters;<sup>11</sup> Utley stated that Lemberger did not respond and the conversation ended.

Utley testified that after Lemberger's decision, he emailed Schallert, first explaining that he was not to be reinstated, and requested a letter stating the reasons for his termination so that he could include it for purposes of his unemployment claim.<sup>12</sup> Utley stated he never received a written termination letter from the Company, and the only reasons for his termination were given (by Schallert) verbally.<sup>13</sup>

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Utley said he then contacted the Union, updating Sellhausen about the situation, specifically his not being reinstated; Sellhausen advised that she was going to meet with both Bezoenik and Schallert but in the meantime that he should contact the Board.

Utley testified that he believed that he was terminated because he asked the union president for information regarding the Company's break policy and had in fact gone to the Union on three separate occasions within a 6-week period. Utley noted that he had just received a favorable performance review with no material issues presented, and the Company had stated that adjusters would not be laid off during the economic downturn because in point of fact, the Company was short on adjusters. Utley intimated that these considerations form the basis of his charge against the Respondent.

Sharon Sellhausen testified that she is the current president of the Union, a position she has held for about 2 years. Sellhausen noted that she has also been employed by the Respondent for about 36 years and was presently employed on the first shift in the receiving and shipping department.

Sellhausen stated that she knows Utley and recalled that in late January or early February 2009 around 6 a.m., he asked her for a copy of a company posting dealing with employee breaks which prompted her to ask him if there was some problem. Sellhausen said that Utley told her that throughout his shift employees had been taken out of the break rooms and were not being allowed to take their breaks; that his supervisor, Ricco, was involved in his matter. Sellhausen said that she told Utley that since Bezoenik was standing nearby, at the folding department office area, she would speak to him immediately about the matter. Sellhausen testified that she thereupon told Bezoenik that Ricco had been taking adjusters out of the break room and that the adjusters on the second and third shift had complained repeatedly about not getting their breaks and reminded him that breaks were necessary to prevent accidents and quality failures. Sellhausen also stated that she pointed out to Bezoenik

<sup>&</sup>lt;sup>11</sup> Utley explained that the day before he met with Lemberger, he had returned to the Company to retrieve his personal property and another adjuster told him that the Respondent had hired two adjusters while he was on layoff and after his termination. (Tr. 49–50.)

<sup>&</sup>lt;sup>12</sup> See GC Exh. 6, a copy of this email dated March 19, 2005.

<sup>13</sup> Utley identified GC Exh. 7, a copy of a document entitled "Permanent Personnel Record Occurrences" dated July 10, 2008, regarding an incident in which he left his machine out of frustration with it. Utley said that this document was in the packet of documents he received from Schallert per his request for disciplines in his personnel file. Utley recalled the incident but stated he was never told of a written discipline in his file and in fact had never seen the document before making his request. He noted that while he did not sign it, Ricco, Schallert, and perhaps Boezenik and following department head, Jim Ryan, did. There were no other discipline records provided by the Respondent according to Utley.

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that Ricco had done this previously and had continued in his practice of denying breaks to employees on his shift.

According to Sellhausen, Bezoenik asked her who was making the complaint but she refused to divulge the name, telling him that he did not need to know the identity of the complainant, only that this behavior was taking place and needed correcting. Sellhausen stated that Bezoenik assured her that he would look into the matter and she related this to Utley. Sellhausen said that she also asked Utley if he wanted to file a grievance over the matter but he declined at that time; she also asked him to let her know if there was a repeat of Ricco's behavior.

Sellhausen recalled that in the aftermath of her discussion with Bezoenik two things happened—first, she learned that Ricco had approached three adjusters trying to determine who had complained to the Union, and had made statements (to the effect and in her words) "vou [had] better not complained. I better not find out it was you [the employee] going to the Union because you'll be next on the hit list." Second, she attended a union-management meeting on February 5, 2009.

Regarding the February 5 meeting, Sellhausen testified that she prepared notes in advance for the meeting and took notes during the meeting.<sup>14</sup> According to Sellhausen, at the meeting she raised this "hit list" or whatever "list" issue, of which she was not aware, and allegations that Ricco was threatening the adjusters and not allowing them their breaks. Sellhausen noted that all of the top managers were present at the meeting, that is, Lemberger, Rewolinski, Bezoenik, and Schallert, but generally aside from asking who might have been present when Ricco allegedly made the remark, management dismissed her concerns as hearsay.

Sellhausen also recalled speaking with union trustee Michael Stelly sometime after Utley had been laid off. According to Sellhausen, Stelly was very upset over Ricco's laughing in Utley's face while informing him that he was to be laid off. Sellhausen said she complained to Bezoenik about Ricco's conduct which she considered outrageous.

Sellhausen testified that the union and management<sup>15</sup> met on March 2, and both she and Stelly raised the Ricco laughing incident as well as Utley's layoff since it was generally understood based on prior union-management meetings that adjuster retention was important for the survival of the Company during the business downturn. 16 According to Sellhausen, the laughing incident was again dismissed by the managers as hearsay.

<sup>&</sup>lt;sup>14</sup> See GC Exh. 9. Sellhausen said that page one of her notes related to topics she wanted to cover at the meeting, including an item"Adj. Breaks-Ricco," and page two were some notes covering some of the matters discussed.

<sup>&</sup>lt;sup>15</sup> Sellhausen was not sure whether Lemberger or Bezoenik attended this meeting.

<sup>&</sup>lt;sup>16</sup> On this point Sellhausen related a November 10, 2008 union-management meeting at which Lemberger, Bezoenik, and Schallert spoke on the issue of impending layoffs and adjuster retention. According to Sellhausen, Lemberger advised the Union that orders were not coming in as anticipated; there were financial issues; and that a new business plan was being devised to keep the Company afloat. Bezoenik spoke to the issue of layoffs, stating that the Company was going to select people for layoff based on their skills and abilities to process orders. Schallert stated that the Company would retain the best of the best. Bezoenik added, however, that adjusters had to be retained because they were more flexible—they could set up, operate, and adjust the machines—than the operators who were not so skilled. According to Sellhausen, Continued

Sellhausen stated that she later heard that the Company had hired someone from outside the Company for one of three open adjuster positions when in fact she knew about 14–16 present employees had applied for these jobs. Accordingly, Sellhausen requested of Schallert a copy of a job postings list<sup>17</sup> covering the period January 28 through February 4, 2009. Sellhausen said that among her concerns about the posting was the awarding of an adjuster position to persons outside the folding department and the Company's not giving current employees a reason for not being selected. Sellhausen said that she complained to Schallert about one outside person's selection who did not posses to her even a fraction of adjuster experience and questioned him as to how such a person could have more skills than someone currently employed, even if not employed in the folding department.

Sellhausen noted that at the time she discovered the list, Utley was laid off at the time (as was another employee, Wayland Morrow), and Utley had applied for the posting. In her view, Sellhausen believed Utley should have been awarded the job, especially since an outside person, Jack Tuescher, was awarded the adjuster job. Sellhausen noted that while Utley was not experienced in open side adjuster duties, she believed he certainly could have been trained to operate on that side as opposed to the hiring of a person with no experience with the machines or the process.

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Sellhausen stated that the day after receiving the applicant list, she filed a grievance against the Respondent for awarding an outside applicant an adjuster job when current adjusters and operators had bid on the position.<sup>18</sup>

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Sellhausen stated that she was aware that the Company's business was in a slowdown at least since November 2008 and that under the collective-bargaining agreement which she helped negotiate, management was empowered to consider the skills and abilities of employees for reduction in force even though the prospective employee to be laid off may have had more seniority over another employee. Sellhausen also conceded that in November 2008, management and the Union discussed that employees selected for retention would be based on retaining the "best of the best" workers.

Sellhausen also noted that the issue of adjuster breaks—usually with respect to second, third, and weekend shifts—had been discussed by the Union and the Respondent over the years in the union-management meetings. Sellhausen stated that Utley was one of the adjusters who periodically claimed that adjusters were being denied their breaks, and that Ricco specifically had denied him a break on one occasion before he asked for the policy notice in February 2009. According to Sellhausen, the Union told management at these prior meetings

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at this meeting management also informed the Union that because of the parlous economic times, the Company could not allow voluntary layoffs.

<sup>&</sup>lt;sup>17</sup> See GC Exh. 10, a copy of the list of those who applied for the three adjuster positions in the open side folding department for January 28–February 4, 2009. As noted on the list, Utley was rejected because he lacked open side experience. Sellhausen testified that she was told later that another applicant list should replace the one contained in GC Exh. 10, which she was told to destroy because she should not have been given it. The replacement list is contained in GC Exh. 12.

<sup>&</sup>lt;sup>18</sup> See GC Exh. 11, a copy of Sellhausen's grievance dated February 27, 2009. Sellhausen stated she filed this 1 day after receiving the postings list. Sellhausen sought by way of remedy the termination of all the new hires hired during the layoff period (November 2008 to present) and the placement of the existing employees (presumably those laid off) in the posted openings.

that Ricco was actually taking adjusters out of the break room and telling them to get back to work, this in spite of the Union's having gained the understanding from management that adjusters need only tell their supervisor of the need for a break and that someone would cover their machines during the break.<sup>19</sup>

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Sellhausen noted that management wanted the machines to be up and running before the adjuster took his break, but some machines take upwards of 8 hours to be set up for a production run. So theoretically, an adjuster might not be able to take a break during the entire shift. Accordingly, adjusters have been advised by managers under such circumstances to tell a supervisor of their need for a break.

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Sellhausen volunteered that other third-shift employees have complained to her about Ricco's either denying the adjusters their breaks or making it difficult for them to take a break, but were afraid for their jobs to be identified. Sellhausen conceded that she did not file formal grievances over their complaints, but either brought the problem up in the union-management meetings (as recently as February 2 and perhaps March 5, 2009) or spoke directly to Bezoenik several times about the break issue. Sellhausen noted that there has been tension between the Company and the Union for a good while over the adjuster break issue because of the potential for industrial accidents caused by a fatigued machine adjuster.

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Andrew Ritter testified at the hearing, stating that he has been employed by the Respondent for about 20 years as a machine adjuster and during the past year has worked the third shift under the supervision of Ricco.

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Ritter recalled that sometime in late January or (early) February 2009, he had a conversation with Ricco about a matter, the substance of which he could not specifically recall.<sup>20</sup> However, Ritter testified that the very next day, Ricco asked him if he had spoken to the Union. Ritter said that he told Ricco that he had not and would have discussed his concerns with him before going to the Union. Ritter noted that this second conversation took place between himself and Ricco on the plant floor and no other employees were around.

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Ritter also testified that he knew Utley, having worked with him on third shift. Ritter recalled a conversation with him during a time that the third shift had been eliminated because of a slowdown and both he and Utley were working on the second shift. Ritter said that he preferred to stay on second shift and asked Utley if he wanted to go back to third shift which was resuming operations. Ritter said that Utley preferred working the third shift, so he and Utley switched assignments.

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Michael Stelly testified that he has been employed by the Respondent since about January 1997, beginning in the shipping department on third shift, and later including the times

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<sup>&</sup>lt;sup>19</sup> According to Sellhausen, in late January 2009, in the context of one of the labor management meetings, Utley happened to be present and told her that he had worked 5-1/2 hours that very day with no break; that Ricco had told him when he was going to able to break but he needed to then get back to work; that Ricco had said that it was too late in the day to take a break in any case.

Sellhausen stated that it was her understanding that under the collective-bargaining agreement employees are entitled to three 10-minute breaks during the shift but such breaks were not set at any specific times.

<sup>&</sup>lt;sup>20</sup> Ritter testified that while he could not remember what he and Ricco discussed in the first conversation, but Ricco never told him he could not take a break. (Tr. 104.)

material to this matter, working as a machine operator on second shift; Stelly said that he is a member of the Union and, as of October 2008, serves as a trustee on the Union's executive board.

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Stelly testified that he knew Utley and recalled that on February 20, 2009, Utley told him at work around 6 a.m. that he was being laid off and that Ricco had snickered at him while informing him of his prospective layoff. Stelly recalled that the layoff news was a surprise to him because adjusters, as far as he knew, were not being laid off and the snickering was simply unprofessional in his view. Stelly testified that he suggested to Utley that after the shift they should speak to Laura Theime, a first-shift supervisor.

After Utley's shift ended, Stelly said that he and Utley met with Theime and he asked why Utley was being laid off. According to Stelly, Theime said that Utley was lowest in seniority of the third-shift adjusters. According to Stelly, Utley said that because of his (motorcycle) injury he could not work as an operator although he had worked the second shift during the last layoff affecting third shift. However, Theime merely gave Utley the telephone number for the state office dealing with unemployment and instructed him to call back on Thursday of the following week and weekly on Thursday thereafter to check on the availability of work.

Stelly said that after the Theime meeting on February 20, he told Utley that he had already apprised Sellhausen of Ricco's behavior and promised to take up the layoff matter with the executive board which was done not immediately but at the union-management meeting of March 2.

Stelly stated that the union-management meeting was held on March 2, 2009, as scheduled, with Schallert, Bezoenik, Rewolinski, and Lemberger present for management; Sellhausen and he were also present. According to Stelly, Sellhausen addressed Ricco's handling of Utley's layoff, saying it was unprofessional. Bezoenik agreed and promised to speak to Ricco about his behavior.

Stelly stated that after this meeting, he spoke with Utley and told him that the Union had raised and protested Ricco's behavior and that Bezoenik said he would speak to Ricco because management did not "appreciate" Ricco's behavior. Stelly said that it was in this conversation that Utley informed him that he had been terminated.<sup>21</sup>

Russell Schallert was called as a witness by the General Counsel.<sup>22</sup> Schallert testified that he is employed by the Respondent as its human resources director, a position he has held for the past 1-1/2 years.

Schallert acknowledged that he notified Utley by telephone of his termination on March 4, 2009, and informed him that the termination was based on his (deficient) skills and abilities, his limited seniority, and his "attitude," which over the last couple of years had become problematic. Schallert also acknowledged receipt of Utley's email (GC Exh. 6) in which he requested a letter citing the reasons for his termination. Schallert admitted that he never provided such a letter to Utley.

<sup>&</sup>lt;sup>21</sup> Stelly's testimony ended on this note, and he was not cross-examined by the Respondent's counsel.

<sup>&</sup>lt;sup>22</sup> Upon motion of the General Counsel, I deemed Schallert an adverse witness under Rule 611(c) of the Federal Rules of Civil Procedure.

Asked by the General Counsel about the Respondent's hiring practices during calendar 2009, Schallert acknowledged that his department announced a job posting on January 28, 2009, for two adjuster positions in the open side department on third shift<sup>23</sup> and that 14 persons applied for these positions, with a current employee, Jason Sobon, being awarded the job. Schallert acknowledged that the Company also posted again on January 28 a job opening for an adjuster position in the open end department on third shift,<sup>24</sup> and a current operator/setup operator was awarded this position. Schallert further acknowledged that on April 4, 2009, the Company posted a job notice for six adjuster positions on the open side department on second shift; and on April 2, posted a job notice for two adjuster positions in the open end department on third shift.<sup>25</sup>

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Schallert agreed that the Respondent had hired three adjusters between January 28 and April 13, 2009, two on first shift and one on third shift, namely Randall Meillier (first shift on January 28), Tuescher (third shift on February 26, 2009), and Adam Birmingham (first shift on April 13, 2009).

Schallert also conceded that Birmingham and another employee hired as an adjuster on April 13, Peter Hebert, were placed by a temporary agency; however, Hebert quit after only working 2–3 days and Birmingham's probationary period had to be extended because he was basically not working out. Schallert noted that he has used a state agency to fill positions, including adjusters, and did in fact post a third-shift adjuster positions with MilwaukeeJobs.com for the period January 16–March 18, 2009. (See GC Exh. 29.)

Schallert stated that one of his responsibilities was to attend the periodic union-management meetings and unless he is absent, he will compile the notes from each. Schallert recalled that at the November 5, 2008 meeting, management informed the Union that the customary voluntary layoff practice of the Company was not effective, given the decline in the Company's business and that a new strategy had to be employed.

According to Schallert, on November 10, 2008, management and labor again met and the Company laid out the new strategy which included a modified work schedule, the elimination of the third shift, retention of adjusters, and layoffs primarily of operators. Schallert noted that operators were the least skilled, and the adjusters, having the most by way of skills, could do the operator's job. Essentially, according to Schallert, because there were fewer orders, the Company needed a more flexible work force that could do the job with fewer workers.

<sup>&</sup>lt;sup>23</sup> The open side job posting notice is contained in GC Exh. 16.

<sup>&</sup>lt;sup>24</sup> The open end posting notice is contained in GC Exh. 17.

<sup>&</sup>lt;sup>25</sup> These job postings are contained in GC Exhs. 18 and 19. Schallert stated that two employees, Dan Blando and Eric Kapitany, were awarded two of the open side positions. Schallert could not say whether the other positions were filled, noting that the Company typically has a very hard time filling adjuster positions internally and struggles (to fill them) externally. (Tr. 185.)

Schallert did note that the other applicants contained in GC Exh. 18 were not awarded the positions. (See GC Exh. 24.) It is noteworthy that with respect to the job postings notices that each states in so many words in a section, "Requirements Specific to Job Posting", that the applicant must have a strong mechanical aptitude, that previous experience setting up, adjusting, and maintaining production equipment strongly preferred. Schallert noted and agreed that Meillier was a carpenter with no manufacturing experience at the time of his hire; Tuescher had no manufacturing or mechanical experience; and Birmingham was placed by a temporary agency.

Accordingly, the Company decided to retain more adjusters and setup operators, and eliminate the operator position.

Schallert stated that management also meets periodically with its management team to discuss among themselves the Company's personnel needs; these are called "manning" meetings and it was at one such meeting that the decision was made on February 18, 2009, to lay off Utley. Schallert stated that he also attended a March manning meeting whereat the decision to terminate Utley was made. Schallert noted that Laura Theime, the folding department manager, provided background information relative to Utley's skills and abilities, as well as critical feedback on his "attitude." According to Schallert, the decision to terminate Utley was made by plant manager Bezoenik and Theime.

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Laura Theime<sup>26</sup> testified that she has been employed by the Respondent for 24 years and currently serves as the manager of the folding department, a position she has held for almost 1 year. Theime stated that her duties and responsibilities include oversight of the Company's special operations department and the open end folding operation.

Theime stated that her normal hours are 6:30 a.m. to 2:30 p.m. (the first shift) but knew Utley to be a third-shift worker daily supervised by Ricco who reported directly to her. Theime acknowledged that Ricco, not she, evaluated Utley, and that she has never been involved in Utley's day-to-day supervision.

Theime noted that she and management representatives from the other plant departments—production, cutting, printing, continuous improvement—along with Bezoenik and occasionally the vice president, Rewolinski, attend weekly "manning" meetings at which management assesses its manpower needs in light of available work on each shift and determines the pace of production for the next week.

Theime testified that she attended one such meeting on February 18, 2009, where temporary layoffs were discussed, including Utley's. Theime stated that the managers did not discuss at that time Utley's alleged inability to take constructive criticism nor his potential for layoff based on his evaluations; according to Theime, these matters were discussed at a manning meeting in March.

Directing herself to this March meeting, Theime testified that the meeting took place in Rewolinski's office and managers Schallert and Bezoenik attended. Theime testified that the information about Utley's not being able to accept constructive criticism came from Ricco who had informed her that Utley was uncomfortable and became agitated and irritated if he (Ricco) tried to help him perform his job duties. Theime noted that Ricco had provided this information to her for the first time in the beginning of February 2009. She noted that at the manning meeting of February 8, the managers did not review Utley's evaluations to date or any other documents relating to his performance, and no such documents were consulted leading up to the February 18 meeting where the temporary layoff decision was made.<sup>27</sup>

<sup>&</sup>lt;sup>26</sup> Theime was also deemed adverse upon motion of the General Counsel. She was also called by the Respondent.

<sup>&</sup>lt;sup>27</sup> Theime identified GC Exh. 31, a copy of a document of potential machine shutdown \_\_\_\_ manning requirements. Notably, both Theime and Schallert testified that this was the only document utilized at the February 18 temporary layoff meeting and that no notes were taken by the managers, nor were any of Utley's evaluations used in arriving at this decision. Notably, neither Schallert nor Theime provided an explication of the document.

Theime stated that when the managers met in March in Rewolinski's office, she and Bezoenik agreed that Utley should be terminated and that Utley's evaluation to date and a production note<sup>28</sup> were the only documents considered by management at the meeting. Theime acknowledged that the assembled managers did not review similar documents for other employees during the meeting. Theime noted that she had reviewed Utley's evaluations covering the period 2006 to the present February 2009 prior to the meeting.

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Theime explained at some length the course she had embarked upon, the approach taken, and the measures she employed and implemented regarding the evaluation of employees when she assumed leadership of the folding department in January–February 2009.

Theime stated that when she began her tenure as folding department head in early 2009; there were problems identified with the employee performance and so her first step was to examine the different problems and commence documentation thereof; for instance, as explained by Theime, there were problems related to an incorrect setup of the envelope machine or whether the envelopes were not made to vendor specifications. Theime stated that at that time she and her supervisors started keeping careful track of the matters with a view towards immediately passing the information on to the employee involved and in this fashion the employee's performance evaluations could be more accurately made. In addition, Theime stated this technique or methodology, which she had employed as a supervisor, was basically designed to identify what she described as barriers to productive efficiency, overcoming them, and at the same time helping the employee to improve his performance.

According to Theime, before she implemented her system in open end in early February, the evaluation process consisted of supervisors simply talking to the employee, working with "occurrence" (incident) cards documenting some problem, but in the end no one did anything about them. Theime said she wanted an evaluation process that was more specific in terms of identifying employee performance problems and with a view to resolving them, not just talking about them. Theime testified that no one told her to implement her system and she did not seek permission from management to institute it.

Theime stated that Utley's annual evaluation was due at about the time she started as department head and with her system in place, she evaluated him and several other employees.

Theime said that she asked for and received (usually in handwritten form) from the pertinent supervisor what she described as strictly factual data about each employee; she asked all supervisors to explain to the employee the nature of the problem(s) and document the conversation.

Regarding Utley, Theime said that she reviewed notes from her personal file that dealt with his performance on third shift (GC Exh. 37), including feed problems that were fixed on second shift and Utley's re-timing (improperly) of the sucker bar, resulting in low production on the third shift. According to Theime, the problem was compounded by Utley's stopping work, getting his coat, and then talking to Union Representative Stelly.

<sup>&</sup>lt;sup>28</sup> The production note is contained in GC Exh. 37 and is dated February 20, 2009, and refers to, inter alia, a "feed problem" with a machine, and Holtz told Robert Kurcz, an assistant supervisor, that Utley got his coat and stopped working and that Utley spent a lot of time talking to Stelly (the union representative), as well as other problems attributed to Utley which she later discussed.

Theime, commenting further about these notes, stated that the second page reflects very low production hours as compared to the first shift; on the third page the notes indicate that on February 6, Utley's machine #604 experienced a number of problems, including a lengthy setup, the running of a bad batch of envelopes, and some nonspecific repairs evidently made.

According to Theime, the notes were in the handwriting of Kurcz, the assistant supervisor, so she spoke to Ricco about these matters and understood that he in turn had spoken to Utley, but she was not sure of this.

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Around March 1, 2009, Theime stated that at her insistence, Bezoenik, Schallert, Rewolinski, and she met to discuss Utley's employment situation. Theime testified that she brought copies of Utley's evaluations and the notes to the meeting and consulted with Ricco beforehand.

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Theime said that Bezoenik informed everyone that business conditions had not improved, that the open end operation was still in decline and that manpower cuts were going to be necessary. Theime stated that the managers to a man knew there were some issues with Utley and "we all came [to the meeting?] to look at him." (Tr. 344.) Accordingly, Theime said that she related her information about him, including her review of Utley's evaluation. Theime noted that as to Utley's evaluations, Schallert commented that they did not look that bad and, in fact, they looked good.

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Theime recalled that Bezoenik commented that Utley did not seem to possess the potential for cross-training. In fact, Theime noted that at the February 20 manning meeting, she and the other managers discussed Utley's "biggest problem," that is, not being able to work on any other machines and, therefore, not amenable to assignment to different sections; that Utley apparently even struggled with the one machine to which he was assigned so he could not be assigned to adjust other machines.

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Theime stated that she responded (basically to Schallert) she was now looking at employee evaluations in a different way; that if an employee needed any improvement, then he could not be said to be meeting expectations and should not be assessed as "meets" expectations. Theime said that such was the case with Utley's evaluations in her view and she agreed that on that basis he should be terminated.

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Theime conceded that with respect to her newly-implemented evaluation system, nothing of a disciplinary nature was in Utley's personnel file and that Ricco was not consulted by her regarding Utley's termination, only his performance. Theime also noted that her opinion about Utley's inability to run machines other than the open end BOEs was based on her general understanding, as will as a possible comment from an open end supervisor or some others that Utley could not run any of his machines. Theime acknowledged that she did not inquire of any employees with knowledge as to whether Utley actually could run other machines.

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Furthermore, Theime admitted that she relied on Ricco's report about Utley in forming her opinion about Utley's abilities along with the information provided by the first-shift supervisors. Theime also noted that while the Respondent was looking at five to six other employees for possible separation at the March termination meeting, Utley was the only employee whose termination was discussed.

# B. The Respondent's Witnesses

Thomas Bezoenik, testifying at the behest of the Respondent, stated that for the past 4 years out of the last 36 years of his employment at Western States Envelope, he has held the position of plant manager at the Butler facility; his duties and responsibilities include generally the oversight and management of all phases of the plant's envelope making operation, to include managing the work force. In that regard, Bezoenik testified that he makes ultimately all layoff and termination decisions while hiring is usually conducted through the human resources department, with the input of department heads and occasionally the respective supervisors. However, according to Bezoenik, all hires, layoffs, and terminations require his approval.

Bezoenik addressed the Respondent's layoff policy historically, stating that the Company in the past usually operated under a voluntary layoff procedure wherein employees were asked to take a day or week off, depending on the extent and depth of the business slowdown; and if the economic situation were especially dire, then the employees would be laid off for weeks at a time which would enable them to apply for unemployment benefits.

According to Bezoenik, initially the voluntary layoff procedure entailed asking employees with the most in the way of skills and abilities (and presumably the highest paid) to take time off, a top-down approach. However, management determined this approach produced a "double whammy" in the sense that the Company was left with the lesser experienced and lesser skilled employees who could not meet the production requirements in an exigent economic environment.

Bezoenik stated that the Company then changed course and decided to take a bottom-up approach to layoffs, which included nonvoluntary layoffs based on a criterion that included consideration of the employee's skills and abilities and where the work was in place.<sup>29</sup> Accordingly, layoffs in the open end department were determined in that fashion, that is the worker's skills and abilities and seniority. According to Bezoenik, the individual's skills were evaluated "just based on common knowledge" of the workers possessed by the department heads and supervisor; basically, according to Bezoenik, "you pretty much know who can do what." (Tr. 365.) However, Bezoenik conceded that while he interacted with employees on the first shift, he did not interact much with regard to second and third-shift employees.

Bezoenik noted that the manning meetings, attended by department heads, production managers, the continuous improvement leader, and himself—but not supervisors—were catalytic for manpower determinations and such meetings produced the layoff list. Bezoenik stated that in the folding department he consulted with Theime (open end) and Dan Priebe (open side) for these purposes.

Bezoenik could not recall the exact date of the manning meeting which resulted in Utley's initial layoff, but recalled that his name along with a few others were slated for layoff. Bezoenik noted that Utley was not the only adjuster laid off, a decision he made, but there was no discussion about Utley's performance or abilities as he recalled.

Bezoenik testified that he also made the decision to terminate Utley in March because the BOE work which Utley performed had dwindled dramatically due to the U.S. Post Office's

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<sup>&</sup>lt;sup>29</sup> Bezoenik cited as examples, if there was a work order on the 5W machine, the Company would use employees capable of operating that machine; if there were no work on the 5O machine, we would layoff off the employees in that department. (Tr. 364.)

significant increase in the mailing rates for larger envelopes. In order to deal with the loss of this business, according to Bezoenik, the Company added five more people to the permanent layoff list. Bezoenik noted that it was much more costly for the Company to keep workers in an indefinite layoff status because health insurance, vacation, and other benefits remained in place; however, if an employee were terminated, these expenses end.

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Bezoenik volunteered that the Company's layoff policy in early 2009 was plying uncharted waters; the Company had little experience with involuntary layoffs. Accordingly, management went by the numbers; that is, how much work was there; how many hours were needed, and what kinds of skills were needed for its work, and who possessed these skills. Along these lines, the third shift was shut down and a lot of people were laid off; however, Utley was sent with others to second shift work.

Bezoenik testified that with respect to Utley's initial layoff, managers considered the available hours of work and the skills and capabilities of all adjusters in the BOE department and made the decision to lay him off on this basis.

Bezoenik conceded that during the economic downturn, management desired to retain more adjusters because they are difficult to replace, and specifically their troubleshooting skills, setup abilities, and their ability to operate machines make them vital; the initial idea was to retain all adjusters because of their superior overall skills and to employ the adjusters' abilities to all three of the jobs involved in envelope production.

However, as it turned out, according to Bezoenik, management determined that all adjusters were not as skilled at operating the machines as initially thought and quality problems resulted. So management again changed course and decided that adjusters would also be subject to layoffs and that they would be considered for such based on their skills at changing (envelope) size and machine setup, troubleshooting, and their ability to perform on more than one machine type. In short, according to Bezoenik, the work (orders) was in flux, so the Company needed a more flexible work force.

Turning to Utley's termination, according to Bezoenik, the most important matter governing the decision was his skill level which extended to only one group of machines—the BOE—and actually only to a select couple of those types of machines; basically, his performance (as evaluated) derived from his skills on that type of machine. Bezoenik admitted that information about Utley was provided verbally by Theime, coupled with the general information he possessed ("in his head")<sup>30</sup> about the skill of the employees working on the third-shift folding end. Bezoenik conceded that the Company did not maintain a lot of documentation of the performance of about 400 employees and did not review every evaluation; but the Company did review some evaluations every month, sometimes twice a year, especially where performance issues, disciplinary matters, training evaluations, and layoffs were concerned.

Bezoenik asserted that he alone made to decision to terminate Utley (and others) at the time and it was made without reviewing "anything." However, after he made his decision he, along with upper management, then started looking at some criteria to determine whether there

<sup>&</sup>lt;sup>30</sup> Bezoenik explained that the information he had in his head about Utley's skill level was acquired over the years as plant manager, being involved in the evaluation of his work force, and having all matters involving the plant operation ultimately coming to and through him, basically stating, "I know what's going on." (Tr. 374.)

was support for the decision. (Tr. 375.) Pursuant to this end, Bezoenik met with Theime, Schallert, and Rewolinski to discuss the decision he had already made to terminate Utley.

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Bezoenik stated that prior to meeting with his upper level managers, he consulted with Thomas Rewolinski, the financial and operations vice-president, who advised that proper documentation would be required to justify his plan to permanently lay off the five subject employees, including Utley.<sup>31</sup> According to Bezoenik, Rewolinski said that Bezoenik would need Schallert's support as well as that of Theime.

According to Bezoenik, the meeting was held (in March) and while Schallert raised his concerns about Utley's evaluations—his having met his job expectations—and management's having done a poor job with them, the consensus of the group was that Utley's skill levels and capabilities and his limited familiarity with a variety of machines justified his termination. Bezoenik noted that Theime mentioned that at the time she had been reviewing evaluations of a few other employees and she had some "opinion" about Utley's performance and in the end she was in sync with his view, that is, his termination was justified.

Turning to the issue of Utley's alleged complaints about being denied breaks, Bezoenik testified that at the time he made the termination decision he knew of no such complaint; that the first he heard that Utley had been denied breaks was when the Board charge was filed, and in substance the charge was that in some fashion, management was interfering with Utley's requesting breaks or his getting involved with the Union about breaks.

Bezoenik testified that he could not remember having any conversation with Sellhausen regarding Ricco and his denial of breaks. According to Bezoenik, the Union and the Company were concentrating on following the collective-bargaining agreement's provisions governing layoffs, a matter occupying a lot of their time, and he simply could not recall anyone from the Union talking about breaks. Bezoenik noted that even after Utley's termination, he could recall no discussions questioning his termination with a union representative at the union-management meetings.

Bezoenik noted that while Utley by name was not mentioned at union-management sessions, he did recall the Union's addressing the Company's hiring of an adjuster-trainee in April 2009, and wanting management to look at the laid-off employees to fill that slot. Accordingly, Bezoenik said the Company called a lot of laid-off employees and tested them for mechanical aptitude. After a review, management decided the Company would be better off with the new employee who had tested well and had a good background for the Company's work, even though it would take him a while to be trained on the machines.

Bezoenik volunteered that in his view it would be more beneficial to the Company to hire an employee who never was an adjuster, when the employee with adjusting experience had proven he was not the best choice in the first place. Along that time of thought, Bezoenik stated he never recalled Utley, parenthetically noting that in his view there was more to the adjuster job than merely adjusting the machines and that ability to work with others, the (proper) attitude, is also important.

Acknowledging that Utley was a 9-year adjuster and also that he had hired someone totally new (to adjusting) as opposed to recalling him, Bezoenik defended his decision, stating

<sup>&</sup>lt;sup>31</sup> Bezoenik was not sure as he testified whether the other employees were adjusters. Additionally, he did not identify them by name.

that when the Company was really busy, employee deficiencies were or could be overlooked. However, when things tightened up (economically) he paid more attention to the problems that needed addressing and ascertained which employee had the requisite skills to assist the Company in meeting its business objectives whether through operating or adjusting machines or materials handling. Accordingly, Bezoenik testified that the Company decided the new adjuster-trainee employee had the right attitude and the requisite skill level to put the Company in better stead from a productivity point of view, ahead of the game—as he put it—in perhaps 1 or 2 years.

Bezoenik specifically denied that Utley's union activities, of which he had no knowledge, had anything to do with the decision to terminate him.

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Bezoenik testified that while he was aware that the collective-bargaining agreement gave him the authority to make permanent layoffs, he, nonetheless, felt it necessary to convene a meeting with his management team to justify his already made decision to terminate Utley because he as a matter of practice did not make final decisions without consulting those affected who might share some additional insight on the matter at hand and he wanted the team to be in agreement with the decision.

Bezoenik acknowledged that some of his untried new hires did not work out in the end, but as far as he was concerned he had very little regard for Utley's abilities, his adjustment skills and capabilities, and his attitude, such that the new hires in effect were worth the gamble.<sup>32</sup>

Bezoenik acknowledged that he has hired six new adjusters for the open side in 2009, three of which at the time of the hearing were still employed.

Charles Tetzlaff identified himself as a 14-year employee at the Butler facility, having been first an adjuster, leadman, and assistant supervisor; Tetzlaff said he currently is a first-shift supervisor whose duties and responsibilities include scheduling work assignments, troubleshooting problems, and evaluating his employees.

Tetzlaff stated that the Company generally runs daily three shifts and a weekend shift, and first shift during the week follows the third shift. According to Tetzlaff in the transition he consults with Ricco, third-shift supervisor, about what had transpired on his shift; for example, what machines were running and any other problems or issues of note. In this "hand off," Tetzlaff stated that Ricco will convey to him any issues experienced by his adjusters working on a given machine so that Tetzlaff's adjuster counterparts can attempt to resolve them. Tetzlaff said that he also prepares a "barrier" test (a problem sheet) for the (second-shift) supervisors who follow his shift which list may include any problems he uncovered on the third to first-shift transition; but he also will occasionally leave a voice mail for the supervisors outlining any barrier test problems he may have encountered.

Tetzlaff testified that he has known Utley for 8 or more years and over time has had occasion to observe him in the transition from third shift. Tetzlaff said that on occasion he would arrive to find machines not running and setup problems that had to be redone. Tetzlaff noted

<sup>&</sup>lt;sup>32</sup> Bezoenik, shown a copy of his affidavit given to the Board agent on July 14, 2009, agreed that he averred that the decision to lay off Utley was based on lack of work in his department, his low seniority and low skill levels relative to the different machines, and these bases were determined on the strength of input from Ricco, Charles Tetzlaff, first-shift supervisor, and Laura Theime.

that he had at times experienced problems with other adjusters but not anywhere near as much as with Utley, especially in terms of the adjustment of the BOEs. According to Tetzlaff, he discussed these matters with Ricco. Tetzlaff said that after a time—more than a year ago—he simply concluded that Utley was "just not getting it," that it was not merely a matter resolvable through additional training on the machines because the same problems repeated themselves. Tetzlaff recalled telling Ricco off and on when he arrived for first shift that he had to repair (this and that), take the dies off and refile/reshear them, and begin the setup all over again on machines worked on by Utley. Tetzlaff could not recall the exact date of the problem with the dies, but believed this occurred some time during the last year and a half.

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Tetzlaff acknowledged that other adjusters also had made similar missteps but usually only in the beginning stage of their employment, especially during their training phases. Tetzlaff volunteered that he also discussed problems he encountered with the condition of machines involving other employees with Ricco.<sup>33</sup>

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Tetzlaff acknowledged that he never formally evaluated Utley and, in fact, was never asked to make any input for purposes of evaluating Utley by Ricco; Tetzlaff noted that he made no evaluative input for Utley in 2009.

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Robert Kurcz, a member of the Union and employed about 20 years, primarily as a machine adjuster, testified that for the last 2 years he has served as a lead person and an assistant supervisor on the first shift where he has generally been employed for the past 12 years.

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Kurcz stated that customarily about 15 minutes before his shift begins, he conducts a "walk through" of the four machines for which he is usually responsible to check on the available orders, and checks with the third-shift adjusters regarding possible problems experienced on their shift and the machines that need to commence their production run. Kurcz noted that as an assistant supervisor he reported problems uncovered on his shift to his immediate supervisor or even the third-shift supervisor, Ricco.<sup>34</sup>

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Kurcz testified that he knows Utley who was one of the third-shift adjusters he consulted daily in the shift change because Utley worked the BOE machines for which he was responsible, and therefore he had opportunity to observe Utley's work.

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According to Kurcz, if he discovered a problem with any third-shift work or machines at the shift change, he would discuss the matter with his first-shift supervisor and actually take him to the machine and review the problem that he believed had been unaddressed on third shift but was left for first shift to fix.

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Kurcz recalled that he discovered several problems with the machines Utley worked on, including adjustment (poor or improper) on the real box apparatus, cutting knives set incorrectly (quite often); basic troubleshooting deficiencies, resulting in a down machine left idle awaiting first shift resolution. Kurcz noted that he has trained other adjusters and that basic training took about 6 months and some of those adjusters did experience problems with their machines. Kurcz, however, stated that Utley had more and more frequent problems than other adjusters.

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<sup>&</sup>lt;sup>33</sup> Tetzlaff did not identify these employees by name.

<sup>&</sup>lt;sup>34</sup> Notably, Kurcz initially stated that he could not recall discussing issues involving Utley with Ricco.

Kurcz conceded that he never provided any formal input for Utley's performance evaluation, but believed that his skills were not as good as other adjusters.<sup>35</sup>

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Kurcz was familiar with the break policy for adjusters and explained that he was told and understood that as general matter adjusters could take their breaks when they had a chance to leave the machine. In the case of an extensive and time-consuming machine change/setup which could take between 6–8 hours, Kurcz stated that adjusters could take turns relieving each other and if the machines were running well, then an adjuster could take a needed break. Kurcz noted also that adjusters were instructed to take no breaks during the first or last hour of their shift (when one adjuster arrives and the other leaves) to ease shift changes.<sup>36</sup>

Thomas J. Rewolinski testified, stating that he has been employed by the Respondent for about 25 years and has held several upper management positions to include controller, treasurer, and his current one, vice president of finance; these former positions and the current one have all been a part of the business as opposed to the production side of the Company's operation.<sup>37</sup>

Rewolinski stated that the Company determined that the regional and national economy and consequently its business started weakening in the spring of 2008, but the Company was able to weather this incipient downturn by resorting to various cost-saving measures, including voluntary layoffs. However, according to Rewolinski, the bottom dropped out of the business in early September 2008, with a 20-percent to 35-percent fall-off in orders which produced serious effects on the Company's profitability as it operates on a high volume-small profit margin basis.

Rewolinski went on to say that the Company continued to try to retain its work force, noting that many of its employees are not only long term (17 to 30 years) workers, but have been working for the Company for generations and are related or married to one another. According to Rewolinski, the Company is family-run in a family atmosphere.

Be that as it may, Rewolinski said that the Company in an unprecedented move was forced for the first time in its 102 year history to resort to permanent layoffs of employees, a

<sup>&</sup>lt;sup>35</sup> Kurcz also conceded that the time overlap between the beginning of first shift and the end of third shift is about 10–15 minutes and he had no day-to-day supervision or observation of Utley's performance and basically only received a report from Utley during this period. Kurcz noted that he witnessed Utley's production with a machine and at least on one occasion Utley was so frustrated he simply left work and never said a word to him during the transition.

<sup>&</sup>lt;sup>36</sup> Kurcz acknowledged that the break policy was rather flexible because the machines could be somewhat temperamental and frustrating.

Yet at the same time, according to Kurcz, the machines had to be running and kept running to be profitable. He noted that set break times were not practicable because an adjuster could never know when a machine needed his attention or had stopped running. Basically, according to Kurcz, adjusters take their breaks around the proper operation of their machines—that is when they are running, and a break may be simply stepping away from the machine and drinking a soda, not necessarily leaving the machine area. (TR.256–257.)

<sup>&</sup>lt;sup>37</sup> I should note that Rewolinski served as the Respondent's Greyhound Lines representative at the hearing and was present when all witnesses testified. Also, I have credited much of Rewolinski's testimony regarding the history of the Respondent, the nature of its business, its fiscal condition, certain economic matters, and the like during the time frame appertaining to this matter.

process he noted was ongoing at the time of the hearing because of the current business recession.

Rewolinski noted that even before the recession, the Company had witnessed a drop-off of around 40 percent on the open end line; the recession simply compounded the matter. Rewolinski stated that along these lines, the BOE machines—which are not only the primary equipment used on the open end line of product, but also pre-recession produced a very profitable niche for the Company, were not being used and the fear was that this product line and the machines used to produce it were disappearing and not likely to return.

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Rewolinski testified that in this context of economic uncertainty and business fall-off, two other matters became highly significant for the Company's operations—lead time and scrap materials. He explained.

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In terms of lead time, the orders from customers often came up on short notice, so that machines had to be set up and run according to the customer's expectations, deadlines had to be met, specifically in the slow economy wherein the Respondent's competitors had their machines available and could acquire Western Envelope business.

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Regarding scrap material—waste—this became especially important in terms of the potential for loss due to improper setup and product returns because of incorrect machine settings. Rewolinski testified that because of the effect these matters had on profitability, the Company determined that it needed highly skilled employees who could set up and run machines properly and meet both the time line expectations and efficiently produce a quality product.

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Rewolinski said these forces drove the Company to resort to laying off employees permanently. Management concluded that there were too many employees on the payroll who were not producing product; and while a simple layoff (temporary) would reduce costs somewhat, the employees' benefits package would still be in place and would continue to siphon off working capital.

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Since the Company's plans included these employment decisions which affected about 127 families' livelihoods, Rowlinski testified that he participated in some but not all of the upper level meetings—the manning meetings—where layoffs and recalls were discussed. Rewolinski stated that he did not think he attended the manning meeting whereat Utley was initially laid off and he had no input in that decision.

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However, Rewolinski testified that he was involved in the meeting where it was decided to permanently lay off Utley. Rewolinski stated he could not recall the exact date of the meeting but could recall asking Schallert to convene the meeting because Bezoenik had been having informal discussions with him (Rewolinski) about persons under consideration for permanent layoff. Rewolinski also admitted that he had been putting pressure on Bezoenik about the need to reduce the work force. Rewolinski stated that when Bezoenik mentioned Utley's name for permanent layoff, he set up the meeting through Schallert.

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Rewolinski stated that at the meeting, no other employee's layoff was discussed except Utley's.<sup>38</sup>

<sup>&</sup>lt;sup>38</sup> Rewolinski noted that there was a lot of discussion probably on the same day and during the period covered by the Utley meeting about, as he described them, "all sorts of people" to Continued

Rewolinski testified that he presided over the Utley meeting and asked the participants to state their reasons for Utley's permanent layoff. Rewolinski said he especially focused on Theime's assessment of Utley's skills which she felt were basically not good enough for retention; Bezoenik also contributed at the meeting but his comments were no different from that which he had told him earlier. Regarding Utley's attitude, according to Rewolinski, this was a minor matter, but Theime recounted Utley's frustrations with the machines on which he was working and his having a difficult time off and on with them; however, Rewolinski could not recall other specifics dealing with Utley's attitude. Rewolinski went on to testify that there was no discussion about Utley's attitude in connection with Ricco, his supervisor, either at the meeting or in his prior discussions with Bezoenik.

Turning to the break time issue, Rewolinski could not recall any discussions between the Union and management during the period covering January and April 2009; he could only recall that in late 2007, there was an allegation of refusals of breaks for adjusters, but no supervisor names were provided to him in an anonymous conversation over the issue. (Tr. 411.)

Specifically rejecting Sellhausen's testimony, Rewolinski could not recall any particular time, least of all the February 5, 2009 time frame, in which the Union discussed in a meeting that he attended the matter of a denial of breaks for adjusters by Ricco or any other manager.<sup>39</sup> According to Rewolinski, the union-management meetings covering February, March, and April for the most part dealt with the layoff issues and the application of the collective-bargaining agreements thereto.

Rewolinski noted that after the decision was made to lay off employees off permanently, there were many discussions with the Union over a strategy to recall those laid off as opposed to the Company's hiring new adjusters. Rewolinski stated that he could not recall any such meetings whereat Utley by name was discussed for possible recall. According to Rewolinski ultimately the Union agreed with the Company's strategy to hire new people as opposed to recalling laid-off workers.

Rewolinski recalled that all of the new adjuster hires since Utley's termination were in the open side department and he believed that Utley was not given any consideration for any open side position.

John Ricco testified that he has been the third-shift supervisor on the open end section of the folding department for about 5 years, but has been employed by the Company for around 19 years starting as an adjuster, then progressing to leadman and assistant supervisor; all of his time with the Company has been spent in the open end.

Turning to the latter part of 2008 and the first part of 2009, he supervised seven adjusters on the third shift, one of whom was Utley whom he has supervised for the 5 years he has supervised on that shift. Ricco also noted that he has worked with Utley for about 8 years

which he also asked management for input about them. Rewolinski declared that Utley's situation was no different. (Tr. 405.) I note that Rewolinski was not asked to identify any other employees discussed for layoff and he provided no names.

<sup>39</sup> Along these lines, Rewolinski examined copies of notes prepared by Schallert of the February 5, 2005 union-management meeting. (See R. Exh. 2, which was inadvertently omitted from the collection of union-management notes thought to cover November 5, 2008, through April 22, 2009, and contained in GC Exh. 30.)

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and during that time became work place friends with him; the relationship, however, soured some years ago and they were not on friendly terms during the time frame covering 2008–2009.

Ricco testified that as the third-shift supervisor, his duties and responsibilities include monitoring the production run-rates and product quality of the machines on the plant floor, and making sure the machine sets-up are done in the allotted time frames. Regarding the adjusters, he supervises them to ensure that the machines are properly greased and oiled and that they are adjusted properly to accomplish the production task at hand. Ricco stated that his supervisory responsibilities for the adjusters including monitoring them and evaluating their performance periodically, and he has the authority to issue disciplinary write-ups; however, he has no hire/fire authority. According to Ricco, his adjuster evaluations are directed to the department head, then up to the human resources department and, once made, are out of his hands.<sup>40</sup>

Ricco identified his evaluations of Utley, the first of which took place in April 2002 but with the participation of then third-shift supervisor, Ralph Ermer; all subsequent evaluations were made by him alone.<sup>41</sup>

Ricco testified about his supervisory experience with Utley over the past 5 years highlighting certain aspects of Utley's performance. Ricco first noted that Utley generally was assigned the BOE (603) machine and was working that machine at the time he was laid off. Ricco concedes that although Utley in his view did have some performance issues—his troubleshooting and analytical skills in particular—he, nonetheless, evaluated Utley as having "met" the Company's expectations for purposes of his evaluations. Ricco confessed that because of his friendship with Utley he may have been lenient in grading Utley's performance, but also noted that Utley always seemed to be trying to improve. Ricco volunteered that he at one time thought that Utley could benefit by a new assignment and considered placing him in a new program called cell implementation and a materials handler position. However, this never happened because management concluded that the Company needed to keep the machine-trained personnel on the machines, so Utley was never taken off of the BOEs in spite of his (Ricco's) view as of January 12, 2006, that Utley was stuck in third gear in terms of the development of his skills and capabilities as an adjuster.

Directing himself to Utley's November 27, 2007 evaluation, Ricco agreed that Utley's analytical skills were improving but Utley had difficulty correcting machine problems timely—the machines were down too long; and despite his struggle, Utley would not ask for help. It was in this context that Ricco said that Utley exhibited agitation and upset over encountered problems and would simply "shut down" when help was offered by others such as Holtz and Eric Kapitany.

Turning to his January 8, 2008 evaluation of Utley, Ricco noted that Utley was inconsistent in that on some days when everything went well he was a different person from the one he witnessed on bad days. Ricco stated that on such days, Utley's attitude was "unproductive," reflective of a bad mood and a demeanor change; Utley would become frustrated, talk back to the supervisors/leadmen, and walk away. Ricco testified that out of leniency he let Utley vent, noting that he did not experience similar problems with other adjusters.

<sup>&</sup>lt;sup>40</sup> Ricco is an admitted supervisor within the meaning of the Act.

<sup>&</sup>lt;sup>41</sup> Utley's evaluations are contained in GC Exh. 36.

Ricco also testified that at this time (2008) the Company was losing customers because of the slowing economy and his comment about a poor repair job by Utley interfering with production reflected his concern that an employee's skill level was now more critical to the success of the Company and that Utley (and others) would be subject to continued evaluation. According to Ricco, this meant that instead of just one evaluation, the Company would evaluate more frequently.

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Ricco stated however, in the end he determined that Utley met company expectations, but again his friendship with him guided his judgment; he did not want Utley to feel beaten up after the evaluation meeting so his criticisms in 2008 were somewhat vaguely stated. Ricco noted that after this evaluation, he had no discussions with management regarding any further evaluation of Utley or whether he should be laid off and no one from upper management ever asked for his opinion on the subject.

However, Utley stated that at some point he did speak with Theime about Utley's performance about the time she assumed leadership of the folding department, she had undertaken a review of all employee evaluations. According to Ricco, Theime asked him about Utley's performance and pointedly questioned some of his consistency factors in Utley's evaluations and wanted an explication of his comments about Utley's job performance, what he meant by the things he wrote in the evaluations. Ricco said that he could not recall more than one occasion on which he spoke to Theime, but was confident that it took place after Utley had returned to work from his accident and, more specifically, some time in February ("February-ish" by his description).

According to Ricco, he and Theime discussed other adjusters, but Theime did not reveal her reasons for seeking information about Utley or the other adjusters; Ricco could not recall the operators being discussed.

Ricco testified that he addressed Utley's attitude with Theime, that it was negative and changeable when things did not go well, his shutting down, and putting people off—consistent with his evaluation comments. Ricco stated that Theime did not ask his opinion about any of his supervised employees, including Utley, for purposes of layoff in this conversation.

Turning to the issue of break times for his shift employees, Ricco stated that operators are entitled to three 10-minute breaks during the shift; adjusters take their breaks if and when time allows. Ricco said that the machines simply cannot sit idle and adjusters have to let someone know when they need to go on break. Ricco noted that in the case of a "big" setup (4–6 hours) he allows adjusters soda or bathroom breaks, but again emphasized that the adjuster had to let someone know.

Ricco stated he could not recall whether he and Theime discussed any break time issues or complaints against him. Ricco said that he learned from Bezoenik that someone had gone to the Union and complained about breaks and he (Ricco) was asked to provide an affidavit to the Board agent. Ricco recalled that Utley was laid off in the beginning of March 2009, but for his part he had no discussions with management about break time and Utley before March 2009.

Ricco specifically denied conversing with any employees regarding their taking breaks before January 2009 and no employee had accused him of denying breaks; he also denied hearing from any union board member or anyone in management regarding his denial of breaks; and he denied that he denied third-shift employees any breaks.

Ricco recalled an incident involving adjuster John Holtz that took place sometime in January or February 2009. Ricco explained that on that day he opened the break room door and said to Holtz, "What are you doing here? Get back to the machine." Ricco said that he and Holtz joke around quite a bit and he was just kidding at the time. Ricco admitted that there were other workers in the break room at the time but could not identify them by name. Ricco also stated that while he has used the Company's public address system to page employees if he cannot otherwise locate him, he could not recall paging any employees at the time of the break room incident with Holtz. 42

Ricco stated that aside from Holtz he has never told an adjuster to return to his machine while on break, and on that occasion Holtz merely chuckled and did not leave the break room.

Ricco admitted that at some point, Bezoenik told him that someone had gone to the Union about the breaks issue and he felt moved to ask Holtz whether he had any knowledge about it and whether he was the one or knew who had. At the hearing, Ricco testified that he just wanted to know from Holtz whether he had made a complaint or had heard anything because nothing like that (the complaint) had ever happened before; Ricco said he was shocked over the matter and wanted to know how it had happened.

According to Ricco, Holtz merely said that someone had gone to the Union and that there was a complaint. Ricco stated that he did not ask any other third-shift adjuster about the matter of breaks and any complaints. Ricco specifically denied asking Utley whether he had gone to the Union with any complaint that he had denied breaks to employees.

Jonathan Holtz testified at the hearing.

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Holtz stated that he has been employed at Western States Envelope for about 12 years and currently serves as a BOE machine team leader on the third shift of the open end folding department; his immediate supervisor is Ricco.<sup>43</sup> Holtz said his duties as team leader are adjusting machines for production jobs, materials handling, and general troubleshooting.<sup>44</sup>

Holtz noted that generally machines are manned by one adjuster and one operator, but currently there are three to four machines running with only two to three adjusters working with the one operator. Regarding breaks, Holtz stated that employees—operators and adjusters—get three 10-minute breaks per shift; adjusters generally take their breaks when they are caught up with their work. According to Holtz, the break policy for adjusters in his view has never really been clearly established, no times are scheduled and the adjuster simply takes his break when he has time or circumstances permit. Holtz acknowledged that adjuster breaks have been a "bone of contention" between the adjusters and management, but no resolution has been achieved. Holtz stated that he (as team leader) interprets the break policy for the adjusters which at one time was to take a break when the adjuster's machine was caught up; however,

<sup>&</sup>lt;sup>42</sup> Ricco noted that the plant area is fairly large—about three football fields—and quite noisy with employees wearing ear protection. Accordingly, when he cannot locate an employee physically, he uses the public address system.

<sup>&</sup>lt;sup>43</sup> Holtz appeared as a witness for both the General Counsel and the Respondent.

<sup>&</sup>lt;sup>44</sup> According to Holtz, team leaders have slightly greater responsibilities than the ordinary adjuster, and are more accountable to their supervisors. Holtz says his team leader responsibilities apply only to the BOE machines.

currently (with the slowdown) there are more machines running (and fewer adjusters) so all breaks have to be coordinated to ensure the machines are running.<sup>45</sup>

Holtz testified that Ricco has been his immediate supervisor for about 5 years and during that time has never denied him or others breaks and knows of no circumstances wherein Ricco challenged any one for taking a break. Holtz recalled, however, a conversation with Ricco in the break room that took place in late January or early February 2009. According to Holtz, Ricco came to the break room and told him to get back to his machine. Holtz stated that he laughed off the comment because he knew Ricco was not serious. Holtz noted that a few days later, Ricco asked him if he had spoken to the Union about the incident and whether he (Holtz) understood that he was joking when he made the comment. Holtz said he told Ricco that he knew Ricco was joking. He testified that he did not consider Ricco's comments threatening.<sup>46</sup>

Holtz testified that he knew Utley who ran the BOEs and had worked with him for about 5 years; Utley was on his team for the last 2 years. As team leader, Holtz said he assigned operators and adjusters to the machines, and assigned Utley to work on different BOE machines so that he could gain familiarity with all of them and to keep the adjusters from doing the same thing every day; other than this procedure, Holtz said that he employed no formal criteria for machine assignments.

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Holtz testified that he observed Utley's performance and believed that Utley's skill level did not meet the Company's expectations for an employee at the top of the pay scales as was Utley. Holtz believed, for instance, that Utley had been employed long enough to make faster machine changes, and on balance he regarded Utley's skill level as less than most but equal to some of the other four to five adjusters on his team.<sup>47</sup>

## IV. The Contentions of the Parties

### A. The General Counsel's Position

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The General Counsel essentially contends that the Respondent (through Ricco) violated Section 8(a)(1) of the Act by its (his) interrogation of employees as to whether they had sought the assistance of the Union about the adjuster break issue and by threatening them with unspecified reprisals if they had so sought the Union's assistance.

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The General Counsel submits that the credible testimony of Utley, mainly that when Ricco, Utley's immediate supervisor, spoke to him in the warehouse during the first week in February, he did so purposefully to inquire of him whether he had gone to the Union for assistance and to tell him that what had happened to other adjusters had nothing to do with him, it was none of his business, and that he had no right to go to the Union.

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<sup>&</sup>lt;sup>45</sup> Holtz volunteered that he believes adjusters may take a break when a machine is down and there are times when one has to simply get away from the machines, which he says can be very frustrating. (Tr. 111.)

<sup>&</sup>lt;sup>46</sup> Holtz did not address at the hearing his response (if any) to Ricco's query as to whether he (Holtz) had spoken to the Union about the incident.

<sup>&</sup>lt;sup>47</sup> On cross-examination by the General Counsel, Holtz said that while Utley was with the Company he and an adjuster, Eric Kapitany had skills superior to Utley, but Andy Ritter did not possess skills superior to Utley; these adjusters comprised his team in early 2009. (Tr. 271–272.)

The General Counsel submits that Utley credibly testified that during the first week of February, Ricco, his immediate supervisor, pulled him aside in the warehouse and expressly asked him whether he had gone to the Union about adjuster breaks and when he said that he had, Ricco then threatened him, telling him that what had happened with other adjusters had nothing to do with him, it was none of his business and he had no right to go (crying) to the Union about the matter. She contends that Ricco's conduct was unlawful, posing both as an unlawful interrogation and a threat of adverse but unspecified reprisal because of Utley's having engaged in the exercise of his Section 7 rights.

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The General Counsel notes that Utley was a rank-and-file employee and Ricco, as his immediate supervisor, not only daily directed him in his job but was authorized to issue him disciplinary write-ups and evaluated his job performance. Under these circumstances, any reasonable employee in Utley's shoes could feel coerced and be intimidated in the exercise of his statutory rights. The General Counsel argues that essentially Ricco inquired of Utley about his exercise of his Section 7 rights and accompanied this inquiry with a threat of unspecified reprisals, all in violation of Section 8(a)(1) of the Act.

The General Counsel contends that when Ricco queried Holtz and Ritter about their possibly having gone to the Union about the break issue, these contacts were also violative of the Act. She notes that Ricco's interrogations were not simply casual queries but reflected his pointed attempts to ascertain who had gone to the Union and that any reasonable employee could interpret Ricco's conduct as intimidating, coercive, and designed to discourage him from going to his union representative in the future regarding working conditions on third shift.

Turning to Utley's layoff on February 20 and his termination on March 4, 2009, the General Counsel asserts that based on the credible testimony on this record, the Respondent both laid Utley off and ultimately terminated him because he engaged in protected activity—seeking the assistance of the Union regarding working conditions on third shift, as well as his concerns that his supervisor was interfering with adjuster breaks, an important term and condition of his (and other adjuster's) employment. She further argues that the Respondent's purported reason for laying off and terminating Utley are pretexts. All in all, the General Counsel submits that she has met her *Wright Line* burden, that the Respondent's defense was insufficient to overcome the clear evidence of its unlawful conduct; and that a violation of Section 8(a)(1) and (3) should be determined.

# B. The Respondent's Position

The Respondent first asserts that the General Counsel failed to make her initial burden under *Wright Line* in that she has failed to show that the Respondent, through its responsible decision maker(s) (principally Bezoenik), had any knowledge of Utley's having engaged in protected activities at or around the time of his layoff and subsequent termination, and that the credible evidence does not support an inference of imputed knowledge on the decision maker's part.

The Respondent also asserts that the General Counsel did not establish that the Respondent acted with animus against the Union in its treatment of Utley, and that any inference of such animus by the conduct of Ricco would not be permissible here because he was a low level supervisor with no authority to establish company policy. Accordingly, the Respondent contends that the General Counsel failed to establish a connection between Utley's activities and the Respondent's decision to end his employment. In short, the Respondent argues the General Counsel failed to show that its decision was motivated by Utley's having possibly engaged in protected activity.

The Respondent, however, submits that even if, arguendo, the General Counsel met her initial burden, the credible evidence of record established that the Company had legitimate business justifications for Utley's layoff and termination, that is, the poor economic conditions faced by the Company and Utley's lack of skills and abilities as compared to other employees.

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The Respondent asserts that Bezoenik and Rewolinski both credibly testified about the dramatic loss of business experienced by the Company, while Bezoenik testified credibly about management's decision to look more closely at open end employees' skill levels in reaching a decision to lay off employees there.

The Respondent submits that it was against this backdrop of events and circumstances that Utley, an adjuster with limited skills and an injury that might prevent his being assigned an operator position, was selected for layoff and subsequent permanent discharge.

All in all, the Respondent contends, the credible evidence establishes that Utley was terminated for legitimate business reasons and not because of his possibly having engaged in protected activities and, in any event, he would have been terminated in spite of his activities.

Turning to the complaint allegations that Ricco interrogated and threatened employees with regard to their seeking assistance from the Union concerning working conditions, that is the adjuster break issue, the Respondent contends that the General Counsel did not establish a violation of Section 8(a)(1).

The Respondent first notes that Ricco credibly denied that he interrogated Utley about his or any employee's union activity in early February 2009. The Respondent further asserts that even if Utley's version of the events in question are believed, the words (in context) do not constitute actionable threat, coercion, or interference with his or any employee's Section 7 rights because Ricco was a low level employee whose comments, if made to Utley, were more in the nature of casual conversation between friends and hardly threatening, especially not to Utley. As to Ritter, he also stated that he did not feel threatened by Ricco's questions. Notably, the Respondent argues that the same may be said about Holtz who testified he knew Ricco was joking about getting out of the break room and returning to his machine.

The Respondent asserts that under the facts and circumstances surrounding Ricco's alleged statements, there was no violation of the Act.

# Applicable Legal Principles

## 1. Section 8(a)(1)

Employer interference, restraint, or coercion of employees who exercise their statutory right to form, join, or assist labor organizations are unlawful under Section 8(a)(1) of the Act.<sup>48</sup> The test under Section 8(a)(1) does not turn on the employer's motive or whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which it may be reasonably said tends to interfere with the free exercise of employee rights under the Act. *Gissel Packing Co.*, 395 U.S. 575 (1969); *United Rentals, Inc.*, 350 NLRB 76 (2007); *Almet, Inc.*, 305 NLRB 626 (1991); *American Freightways Co.*, 124 NLRB 146, 147 (1959). Thus, it is

<sup>&</sup>lt;sup>48</sup> Sec. 29 U.S.C. §158(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Section 7 of the Act."

violative of the Act for the employer or its supervisor to engage in conduct, including speech, which is specifically intended to impede or discourage union involvement. *Johnson Technology, Inc.* 345 NLRB 762 (2005); *F. W. Woolworth Co.*, 310 NLRB 1197 (1993); *Williamhouse of California, Inc.*, 317 NLRB 699 (1995). The test of whether a statement or conduct would reasonably tend to coerce is an objective one, requiring an assessment of all the circumstances in which the statement is made as the conduct occurs. *Electrical Workers Local 6 (San Francisco Electrical Contractors*), 318 NLRB 109 (1995). *Flying Food Group, Inc.*, 345 NLRB 101 (2005); *Rossmore House*, 269 NLRB 1166 (1984), enfd. sub nom. *Hotel and Restaurant Employees Local 11 v. NLRB*, 706 F.2d 1006 (9th Cir. 1983). *Medcare Associates*, 330 NLRB 935 (2000). *Greenfield Die & Mfg. Corp.*, 327 NLRB 237 (1998).

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It is well settled that an employer's interrogation of employees concerning their union activities may be violative of the Act. *Marjam Supply*, 337 NLRB 337 (2001). *Hudson Neckwear, Inc.*, 302 NLRB 93 (1991).

Regarding employer interrogations of employees, however, it is well established that interrogation of employees is not per se illegal. The Board has held that the test of the illegality of interrogation is whether, under all the circumstances, it reasonably tends to interfere with, restrain, or coerce employees in the exercise of their rights. *Rossmore House*, 269 NLRB 1176 (1984). Under the totality of circumstances approach, the Board examines factors such as whether the interrogated employee is an open and active union supporter, the background of the interrogation, the nature of information sought, and the identity of the questioner. *Demco New York Co.*, 337 NLRB 850 (2002). Other factors to be considered about questioning of an employee include time, place, and personnel involved. *Blue Flash Express, Inc.*, 109 NLRB 591 (1954); *American Freightways Co.*, 124 NLRB 146, 147 (1959); and *NLRB v. Illinois Tools Works*, 153 F.2d 811 (7th Cir. 1946).

Among the circumstantial factors examined are the background of the interrogation, the nature of the information sought, the identity of the questioner, and the place and method of interrogation. *MSK Corp.*, 341 NLRB 43 (2004); *Sunnyvale Medical Clinic*, 277 NLRB 1217, 1218 (1985).<sup>49</sup> Significantly, he Board has also considered other factors such as whether the questioning was by an immediate supervisor who worked closely with the employee, whether it was made in a joking tone, and whether the employee was an open, active union supporter, *Raytheon Co.*, 279 NLRB 245 (1986); *Action Auto Stores, Inc.*, 298 NLRB 875 (1990); *Dealers Mfg. Corp.*, 320 NLRB 947 (1996).

Thus, to avoid sanction, the employer is advised to inform the employee of the purpose of the questioning, assure him that no reprisals will take place, and obtain his participation on a voluntary basis; the questioning must occur in a context free of employer hostility to the union,

<sup>&</sup>lt;sup>49</sup> The Board, however, does not mechanically apply these factors in each case. Rather, it views these criteria as useful indicia that may serve as a starting point for assessing the totality of circumstances. *Professional Medical Transport*, 346 NLRB No. 108 (2006); *Perdue Farms, Inc. v. NLRB*, 144 F.3d 830 (D.C. Cir. 1998). The rank of the interrogator may also be weighed as a circumstance or factor relating to the identity of the questioner in determining the coerciveness of the statement, along with the truthfulness of the reply. *Toma Metals, Inc.*, 342 NLRB 787 (2004); see *Soltech, Inc.*, 306 NLRB 269 fn. 3 (1992), and *Facchina Construction Co.*, 343 NLRB 886 (2004).

Note also that the Board also may consider whether employer inquiries into protected conduct were not accompanied by assurances against reprisals in determining coercive conduct. *C. S. Telecom, Inc.*, 336 NLRB 1193 (2001).

must not exceed the necessity of the legitimate purpose by prying into other union matters eliciting information concerning an employee's subjective state of mind, or otherwise interfering with the statutory rights of employees. When an employer transgresses the boundaries of these safeguards, he loses the benefits of the privilege. *Johnnie's Poultry Co.*, 146 NLRB 770, 775 (1964), enf. denied on other grounds 344 F.2d 617 (8th Cir. 1965), cited in *A.S.I., Inc.*, 333 NLRB 70, 72 (2001).

Notably, also, the Board has considered even arguably brief, casual, and not followed-up questioning violative of the Act if the words and context contain elements of coercion and interference. Sea Breeze Health Care Center, 331 NLRB 1131 (2000). In Sea Breeze Health Care Center, the Board underscored its decision by citing the observation of the Fifth Circuit in NLRB v. Laredo Coca Cola Bottling Co., 613 F.2d 1338, 1342 fn. 7 (1980):

[A]n employee is entitled to keep from his employer his views so that the employee may exercise a full and free choice on whether to select the Union or not, uninfluenced by the employer's knowledge or suspicions about those views and the possible reaction toward the employee that his views may stimulate in the employer. That the interrogation might be courteous and low keyed instead of boisterous, rude, and profane does not alter the case. [Quoting from the underlying decision in *Laredo Coca Cola Bottling Co.*, 241 NLRB 167, 172 (1979)].

The Board has found that Section 8(a)(1) may also be violated by an employer's threats to employees of unspecified reprisals. *St. Margaret Mercy Health Care Centers*, 350 NLRB 203(2007); *California Gas Transport*, 347 NLRB 1314 (2006). On the other hand, the Board has found that an employer may violate the Act by promising employees benefits of a specific or unspecific nature. *Mickey's Linen & Towel Supply*, 349 NLRB No. 790 (2007); *Christopher Street Corp.*, 286 NLRB 253 (1987).

Additionally, an employer who threatens an employee with unspecified reprisals for engaging in union or other protected activity violates Section 8(a)(1). *SKD Jonesville Division*, 340 NLRB 101 (2003).

While Section 8(a)(1) prohibits certain speech and conduct deemed coercive, employers are free under Section 8(c) of the Act to express their views, arguments, or opinions about and regarding unions as long as such expressions are unaccompanied by threats of reprisals, force, or promise of benefits. *NLRB V. Gissel packing Co.*, 395 U.S. 575 (1969); *International Baking Co. & Earthgrains*, 348 NLRB 1133 (2006).<sup>50</sup>

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<sup>&</sup>lt;sup>50</sup> Section 8(c) of the Act provides that:

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

The Board has noted that Congress added Section 8(c) to the Act in 1947 as part of the Taft-Hartley Act because it believed that the Board has made it "excessively difficult for employers to engage in any form or noncoercive communications with employees regarding the merits of unionization."

In *International Baking Co. & Earthgrains*, a supervisor told an employee, among other things, that the union was not a good thing and that the union would harm him as he was making decent money and advised the employee not to sign a union card. The Board found no violation, holding that the supervisor was merely expressing his lawful opinion concerning the Continued

In fact, the Board as determined that even "intemperate" remarks that are merely expressions of personal opinion are protected by the free speech provisions of Section 8(c). *International Baking Co. & Earthgrains*, supra, 1133. *Sears, Roebuck and Co.*, 305 NLRB 193 (1991). In accord, an employer is entitled to explain the advantages and disadvantages of collective-bargaining to its employees in an effort to convince them that they would be better off without a union, as long as there are no threats or promises of benefits. *Amersino Marketing Group LLC*, 351 NLRB 1055 (2007); and *Langdale Forest Products Co.*, 335 NLRB 602 (2001).

2. Section 8(a)(3)

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3)<sup>51</sup> or violations of Section 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the interference that protected conduct was a motivating factor in the employer decision. This showing must be by a preponderance of the evidence. Then, upon such showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The Board's *Wright Line* test was approved by the United States Supreme Court in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983).

Under the *Wright Line* framework, the General Counsel must establish four elements by the preponderance evidentiary standard. Accordingly, the General Counsel must first show the existence of activity protected by the Act, generally an exercise of an employee's Section 7 rights.<sup>52</sup> Second, the General Counsel must show that the employer was aware that the employee had engaged in such activity. Third, the General Counsel must show that the alleged discriminatee suffered an adverse employment action. Fourth, the General Counsel must establish a line or nexus between the employee's protected activity and the adverse employment action. If the General Counsel establishes these elements, she is said to have

effects of unionization on the employees.

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<sup>&</sup>lt;sup>51</sup> Sec. 8(a)(3) of the Act (29 U.S.C. §158(a)(3)) makes it an unfair labor practice for an employer to discriminate in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

<sup>&</sup>lt;sup>52</sup> The protected activity includes not only union activities but also invocation and assertion of rights guaranteed employees under Sec. 7 of the Act. *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984); *Interboro Contractors*, 157 NLRB 1295 (1966).

Section 7 of the Act protects the rights of employees to engage in concerted activities for their mutual aid or protection, and Section 8(a)(1) of the Act prohibits employers from interfering, restraining, or coercing employees in the exercise of that right. In its decision in *Meyers Industries*, 268 NLRB 493 (1984), the Board found that employee activity is concerted when it is "engaged in, with, or on the authority of other employees." The employer is found to violate the Act if, having knowledge of an employee's concerted activity, it takes adverse employment action that is "motivated by the employee's protected concerted activity." Id. at 497. In a later decision, the Board additionally clarified that "concerted activities" protected by Section 7 are those "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers Industries II*, 281 NLRB 882 (1986). (*Copper Craft Plumbing, Inc.*, 343 NLRB No. 108 (2009).)

made out a prima facie case of unlawful discrimination, or a presumption that the adverse employment action violated the Act.<sup>53</sup>

The Respondent, in order to rebut this presumption, is required to show that the same action—the adverse action—would have taken place even in the absence of protected activity on the employee's part. *Mano Electric, Inc.*, 321 NLRB 278 (1996); *Farmer Bros.*, 303 NLRB 638 (1991).

While the *Wright Line* test entails the burden shifting to the employer, its defense need only be established by a preponderance of evidence. The employer's defense does not fail simply because not all of the evidence supports, or even because some evidence tends to negate it. *Merrilat Industries*, 307 NLRB 1301, 1303 (1992).

As a practical matter, the General Counsel must prove by the preponderance of the evidence that animus toward an employee's protected activity was a substantial or motivating factor in the adverse employment action. *Tower Automotive Operations USA I, LLC*, 355 NLRB No. 1 (2010).

Accordingly, the Board has held that an animus or hostility toward an employee's protected and concerted activity or union activity may be inferred from all the circumstances, even without direct evidence. Therefore, inferences of animus and discriminatory motive may derive from evidence of suspicious timing, false reasons given in defense, failure to adequately investigate alleged misconduct, departures from past practices, tolerance of behavior for which the employee was fired, and disparate treatment of the discharged employees. *Adco Electric*, 307 NLRB 1113. 1123 (1992); enfg. 6 F.3d 1110 (5th Cir. 1993); *Electronic Data Systems Corp.*, 305 NLRB 219 (1991); *Bryant & Cooper Steakhouse*, 304 NLRB 750 (1991); *Visador Co.*, 303 NLRB 1039, 1044 (1991); and *In-Terminal Service Corp.*, 309 NLRB 23 (1992).

Significantly, the judge may also consider prior unfair labor practices in resolving this issue.<sup>54</sup>

#### Discussion and Conclusions

# A Few Preliminary Observations

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I have taken to heart, and considered for resolution of the case, the Board's admonition to judges that we as the triers of fact should not substitute our judgment for that of an employer armed with its particular knowledge and experience in the relevant business endeavor or activity and faced with the vicissitudes and exigencies of business life, may make decisions affecting its employees' conditions of employment based on the exercise of its business judgment. *Lamar Advertising of Hartford*, 343 NLRB 261 (2004); *Yellow Ambulance Service*, 342 NLRB 804 (2004). More to the point, the Board has emphasized that the crucial factor is not whether the business reason was good or bad, but whether it was honestly invoked and was in fact the cause of the action. *Framan Mechanical, Inc.*, 343 NLRB 408 (2004).

<sup>&</sup>lt;sup>53</sup> Yellow Transportation, Inc., 343 NLRB 43 (2004); Tracker Marine, 337 NLRB 644 (2002).

<sup>&</sup>lt;sup>54</sup> See, for example, *Atlantic Veal & Lamb, Inc.*, 342 NLRB 418 (2004), where the Board noted that the knowledge element of the General Counsel's initial burden also may be satisfied by evidence of the surrounding circumstances, including contemporaneous 8(a)(1) violations.

Second, in agreement with the General Counsel, this case in its material aspects is fairly straightforward in that the charges—the alleged threats and interrogations of employees as well as the alleged discriminatory layoff and discharge—essentially revolve around the Charging Party, George Utley, and the central issue of whether the Respondent unlawfully dealt with him because he sought the assistance of the Union regarding his and perhaps other adjusters' break rights. Accordingly, contrary to the stated position of the Respondent on brief, this case in my view is not necessarily about animus to the Union, except only perhaps derivatively because of the negative effect the Company's conduct could have on the Union's ability to represent the employees in the unit or to discourage employees in terms of their seeking union assistance. Accordingly, my primary focus will be on the gravamen of the charges, that is, Utley's activities and the Respondent's subsequent action with respect thereto to determine whether the Act was violated.

Third, regarding witness credibility, I should state at the outset that I found the General Counsel's two main witnesses—Utley and Sellhausen—to be eminently credible. Utley presented as a straightforward and candid relater of the events surrounding his charges. Likewise, Sellhausen presented well, and her testimony was corroborated by her contemporaneous notes and other employee witnesses, especially in terms of what appeared to be an ongoing historical issue of adjuster breaks and Ricco's implication in the matter.

With these observations in mind, I turn to the discussion of the charges and my conclusions in their resolution.

As to the 8(a)(1) allegations, I would find and conclude that the Respondent violated the Act by and through Ricco, an admitted supervisor, who in my view undertook what amounted to a canvassing of the adjusters on his shift to determine who had gone to the Union about the adjuster break issue, in which his behavior was implicated.

In this regard, Sellhausen's testimony about the first week of February 2009 is especially significant. Sellhausen testified that Utley asked her for a copy of a notice posted perhaps a few years earlier by the Company that dealt with adjuster breaks and also told her about certain incidents involving Ricco. Sellhausen stated that she immediately then went to Bezoenik and leveled a complaint about Ricco without naming any specific complainants, but stating that the repeated complaints came from the second and third shifts. Sellhausen said that she received Bezoenik's assurances that he would address the matter immediately.

Utley testified that Ricco, the next day, pulled him aside and in the warehouse interrogated him about whether he had gone to the Union about the break issue, and then told him that he was bothering people and did not need to talk to anyone else—the Union presumably. When Utley admitted that he was the one who had approached the Union, Ricco then said he (Utley) had no right to go "crying" to the Union, that what had happened with other adjusters was none of his business.

Standing alone, one could question Utley's testimony. However, the other third-shift adjusters, Holtz and Ritter, also testified that they, too, around this time (late January or early February) were questioned by Ricco about whether they had spoken to any representatives from the Union. While Holtz testified that he took this first conversation with Ricco as jocular in nature, he noted that in the second encounter Ricco asked him if he knew that he was joking. This suggests that even Ricco was aware that he may have crossed the line of legal propriety.

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Ritter, in likewise, testified that in late January or early February, Ricco asked him if he had spoken to the Union, and Ritter, defensively (and somewhat nervously) in my mind, told him that he had not and that in any case he would have discussed it first with Ricco.

Ritter's reaction in particular, in my view, underscores the kind of intimidation an immediate supervisor can engender by such an inquiry, so much that employees may be discouraged from going to their representative for information about, let alone assistance in, protecting the terms and conditions of their employment.

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I note that Ricco claimed that he only found out about someone's going to the Union to complain about (adjuster) breaks from Bezoenik, who informed him of his having to provide an affidavit to the Board in March. However, I do not believe him. It is clear from the three adjusters, Holtz, Ritter, as well as Utley, that he knew before then of the complaints regarding the issue. Likewise, I have not credited Bezoenik's denial of his conversation with Sellhausen who I believe advised him of the issue and Ricco's involvement therein. It is clear in my mind that Bezoenik spoke to Ricco in the aftermath of Sellhausen's complaint. Ricco then took it upon himself to find out who had gone to the Union; hence, the canvass of the three adjusters then working on third shift—Holtz, Ritter, and Utley. When Holtz and Ritter denied any involvement, that left Utley who freely admitted to Ricco that he had indeed gone to the Union about the adjuster breaks. I would, as noted, credit Utley's version of his encounter with Ricco which, in its entirety, not only constituted an unlawful interrogation but also an unlawful threat of unspecified reprisals in violation of the Act.<sup>55</sup>

Directing myself to Utley's layoff and termination, I would find and conclude that the General Counsel established the requisite prima facie case as dictated by *Wright Line*.

First, regarding the Respondent's knowledge of Utley's having engaged in protected activity, contrary to the Respondent, I would find and conclude that the Company's management—mainly Bezoenik—knew or came to know that Utley had gone to the Union seeking information and assistance regarding the Respondent's break policy, essentially based on Utley's belief that Ricco was "running" adjusters out of the break room. As I have determined earlier, Sellhausen brought the matter to Bezoenik's attention on the very day that Utley made his request of her for a copy of the break policy. I do not credit Bezoenik's half-hearted denial—he did not recall—of Sellhausen's complaint. In point of fact, I believe that Bezoenik, acting on his assurances to Sellhausen, went to Ricco and advised him of the complaint that was leveled against him. I note here again, as an aside, that the adjuster break issue and Ricco's involvement therewith had been raised before by the Union, and was a "bone of contention," according to one of the Respondent's own witnesses.

However, be that as it may, I believe that it was Sellhausen's anonymous complaint that moved Ricco to undertake his canvass of the adjusters on third shift to ascertain who had made the complaint against him. Eventually, ruling out the two other adjusters, Ricco approached Utley about the matter and determined that it was he. I have previously discussed the encounter but clearly at this juncture in early February 2009, the Respondent (through Ricco) was aware that Utley was the employee who had complained to Sellhausen, who in turn complained to Bezoenik—Ricco's boss.

<sup>&</sup>lt;sup>55</sup> It should be noted that I have credited Holtz and Ritter in terms of their encounter with Ricco and would find and conclude that Ricco conducted an unlawful interrogation of them also.

The Respondent, however, contends that Ricco was a low level supervisor, as I interpret the point, and that his status is not sufficient to impute knowledge or presumably any responsibility to the Company. First, as previously noted, Ricco is an admitted statutory supervisor. Second, the Board's interpretation of statutory supervisor permits of no such distinction based on the purported supervisor's rank or status in the employer's administrative hierarchy.

Clearly, the Act and the Board's interpretation of supervisory status thereunder relates not to administrative status, rather the functions of the person claimed to be a supervisor, that is, whether he assigns employees and responsibly directs employees and is accountable for the performance of tasks of others, and generally whether the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action if necessary. *Oakwood Health Care*, 340 NLRB 686 (2006).

In the instant case, Ricco testified of his role at the Company, describing himself as a supervisor and more particularly stating that his authority included assigning adjusters to their machines, dictating their schedules, allowing them breaks, disciplining them, and evaluating their performance. Ricco to a certainty was a statutory supervisor and therefore on this record any imputation of knowledge through Ricco of Utley's activities to upper management would be appropriate. However, I believe that Utley's having gone to the Union was communicated by Ricco directly to Bezoenik, who made the ultimate decision to lay off and/or terminate him. This will be discussed more at length later herein. In any case, I would find and conclude that the Respondent knew of Utley's complaint and his request for union assistance before he was laid off and later discharged.

Regarding the issue of adverse action, certainly Utley's layoff and termination qualify for this element of the *Wright Line* criteria. As to the nexus requirement, in my view this element is satisfied by the contemporaneousness of Utley's protected activity and his layoff on February 20. Also, crediting Utley, persuasive to me is Ricco's behavior exhibited while informing Utley of his planned layoff. In this regard, it should be noted that Ricco's untoward behavior while informing Utley's of his layoff took place only a short time after Ricco had confronted Utley in the warehouse and complained of his "crying" to the Union. Also, it is significant to me that Ricco told Utley of his impending layoff even before Utley had received official word from the department head, Theime, or even the human resources head, Schallert. Thus, it is clearly inferable that Ricco must have had some involvement in the layoff decision and received advance notice of the decision.

I note also that Utley complained to Stelly, his union representative, about Ricco's behavior and Stelly promised to raise the issue with the Union. Stelly credibly testified that after Utley's layoff he informed the management team on March 2 about Ricco's behavior and Bezoenik agreed to speak to Ricco. In my view, Utley's initial complaint, along with his going to the Union once more to complain about Ricco's behavior, provides further nexus between not only Utley's initial layoff and his having engaged in protected activity, but also his ultimate termination. I note in this regard that contrary to the Respondent, the General Counsel clearly established animus on the part of Ricco but not directly against the Union, but against Utley's exercise of his Section 7 rights. I note that Utley and Ricco once enjoyed a friendship that evidently ended about the time Ricco became his third-shift supervisor; that for reasons unstated on the record the relationship did not end amicably. However, in my view, whatever was the state of their personal relationship in February 2009, this had little or nothing to do with the decision to lay Utley off on February 20.

Turning to Utley's permanent layoff in early March, in my view the Respondent's animus against his activities still obtained and was operative in this decision. As noted above, at the March 2 meeting of labor and management, Utley's complaint about Ricco's behavior was broached by Sellhausen, another strike against him but more importantly another instance of Utley's going to the Union for assistance, even while on layoff. Then on March 4, a mere 2 days later, Utley is terminated. In my view, this is not mere coincidence but evidence of suspicious timing, which abundantly establishes animus against Utley's going to the Union for assistance and making complaints about his supervisor's possible infringement on his and other adjusters' break rights, an important term and condition of their employment at Western States Envelope.<sup>56</sup>

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The General Counsel clearly in my mind met her initial *Wright Line* burden.

We now turn to the Respondent's main defense—that Utley was initially laid off and then permanently terminated for legitimate business reasons; and further, irrespective of his possibly having engaged in protected activities, under the economic circumstances at the time coupled with his deficient skills and abilities, he would have been laid off and later permanently terminated.

First, the Respondent, as I have noted earlier, persuasively established that the Company, like many others in the national economy, was in the throes of a serious business turndown—the national recession more to the point—during the relevant period and as of around the fall of 2008, the Respondent's business began a serious decline.

Second, according to the collective-bargaining agreement then in force between the Union and the Respondent, the Company was entitled to reduce its work force in the various departments on the basis of seniority within the department in question and skills, ability, and efficiency as determined jointly by the relevant supervisor, director of human resources, plant manager, and/or the vice president of manufacturing.<sup>57</sup> It would appear established that the Respondent's management did ostensibly meet and jointly decide that Utley would be laid off and terminated on the dates alleged in the complaint.

While the Respondent was in a parlous economic condition at the time of Utley's layoff and was entitled to reduce its work force to deal with this situation, the question remains whether the managers exercised its prerogative in an honest and good-faith fashion.

The General counsel contends that the Respondent's defense is rife with pretext, offered only to disguise its true reason for ridding itself of Utley who evidently went to the Union perhaps too often to suit management.

<sup>&</sup>lt;sup>56</sup> It is my view, based on the undisputed evidence of record, that breaks for adjusters were of the utmost importance to the performance of the adjuster job. The machines were evidently complex and required a certain precision in their setup and operation, which often took several hours to accomplish. According to the witnesses, they also presented with an exasperating quality for their adjustment and operation along with the possibility of danger, as they were fast moving and used cutting blades.

<sup>&</sup>lt;sup>57</sup> See GC Exh. 8, a copy of the agreement, the effective dates of which are April 29, 2007, through May 1, 2010. The relevant layoff provisions are contained in sec. VI covering seniority, layoffs, transfers, and severance.

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The General Counsel submits that the record established clearly that the Respondent clearly valued the adjusters for their training and skills with the machines and experienced much difficulty in hiring suitable adjuster personnel within and without the Company. Utley, she argues on the record, while admittedly possibly not a stellar employee, as his coworker and company witness Jonathan Holtz attested, skill-wise was less than most and equal to some, to include Andy Ritter in the latter category. She notes further that while the Respondent disparaged Utley's skills and abilities, it advertised for and eventually hired outside persons who had no mechanical or manufacturing job experience.

The General Counsel submits that while the Company was reducing its work force, there 10 was no bona fide process that was applied to Utley's layoff, and Bezoenik's testimony on the subject she describes as vague. The General Counsel further contends that the case for Utley's deficient skills and abilities is seriously undercut by his performance evaluation over the years up to the time he was terminated, all of which indicate he was performing up to—meeting company standards, and in some areas performed at a higher level. She also noted that the 15 aforementioned Ritter-Utley's coworker on third shift and evaluated by Ricco-based on his performance evaluations, the latest of which took place in December 2008, had serious attendance problems and, according to Ricco, was in danger of termination for that reason. Ricco, she notes, also wrote that Ritter had consistency and erratic mood swings accompanied by frustration that interfered with his performance.<sup>58</sup> The General Counsel asserts that there is 20 a serious question as to why the Respondent retained Ritter but terminated Utley. She answers, submitting that Utley's termination was simply and plainly based on pretextual reasons to cover up the Respondent's discriminatory motive.<sup>59</sup>

On balance, the General Counsel contends that the Respondent's purported reasons for terminating Utley were pretexts and not supported by the record evidence.

While I would agree with the General Counsel that some of the evidence of record points to what I would call incongruities that would support an inference of pretext on the Respondent's part regarding Utley's layoff and termination, I am, as I earlier noted, concerned about second guessing an employer's decisions regarding the conduct of its business affairs. Much of the General Counsel's argument focuses in my view on matters that touch directly or tangentially on the business judgment of Bezoenik and his management team regarding its staffing needs in the context of the various and exigent economic circumstances the Company faced at the time and beyond.

Because I have previously determined that the Respondent essentially and primarily, through Ricco, violated the Act by interfering with Utley's (and other employees') Section 7 rights before he was laid off, the question for me is whether that misconduct directly or even residually but materially influenced the Respondent's decision to lay Utley off initially and then permanently terminate him, all within the space of about a month's time of Ricco's offending behavior; and whether the Respondent, irrespective of Utley's protected conduct, would have indeed laid him off and terminated him.

In resolving these issues, I have considered Utley's history with the Company. As previously noted, Utley was employed by the Respondent for about 10 years as an adjuster,

<sup>&</sup>lt;sup>58</sup> See GC Exh. 32, copies of Ritter's performance evaluations.

<sup>&</sup>lt;sup>59</sup> The General Counsel also pointed to a number of employees, including adjusters, who had histories of so-called attitude problems but are still employed; for example, Brian Gebo and Dave Helstowski.

and during that time was evaluated by just two supervisors, Ralph Ermer and Ricco; Ricco evaluated Utley from 2006 until his layoff on February 20, 2009. Because of the relevant circumstances associated with this case, I paid particular attention to Ricco's evaluations of Utley which covered calendar year 2003-2009.<sup>60</sup>

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Not surprisingly, as with any employee, Utley's performance over the years had its ups and downs, although in every year for which an evaluation was produced, he always "met" the employer's requirements for a satisfactory employee. Over the years that Ricco alone evaluated Utley, he noted some performance issues, mainly in the categories of job knowledge and analytical ability, stating at one point (2006) that he seemed to be stuck in third gear and was sometime frustrated in troubleshooting his machine; and after 3 years, at that time did not quite meet the Company's expectations as a premium top-rate BOE (machine) adjuster.

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Ricco noted in 2007 that as time went on Utley sometimes lost his patience, became agitated and upset over problems with the machines, and lost his focus and that year was a roller coast year for him. In 2008, however, Ricco noted that Utley's job knowledge and diagnosis had definitely improved although he seemed to struggle still somewhat with other BOE machines; Ricco concluded that Utley needed to focus on being consistent and cover all aspects of his job. In 2009, the last evaluation, noting that Utley lost several months of work in 2008 due to his motorcycle accident and injuries, Ricco stated that Utley understood his job very well (job knowledge), that his speed on the machine was improving, and that he could troubleshoot the BOE 603 machine pretty well but needed improvement on the other BOEs. Ricco also noted that Utley was a very emotional person who sometime let his emotions get the best of him, that he was much more productive when he focused on the positive. All things considered, Ricco concluded that Utley "met" the Company's expectations for employee performance in January 2009.

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performance evaluations rendered by Ricco for the years he evaluated Utley up to the time of Utley's layoff and termination. The evaluations in my view reflect a kind of "nuts and bolts" assessment of Utley's mechanical skills as an adjuster by Ricco.

It should be understood that the foregoing are what I view as highlights of Utley's

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However, these evaluations also included other comments from Ricco that in shorthand fashion can be said to reflect on his thoughts about Utley's "attitude" about and for his job.

Notably, from the beginning of his supervision of Utley, Ricco noted, with the exception of 2007, Utley always had had good attendance and in several years before he evaluated him, Utley had perfect attendance; by evaluation time in 2008, Ricco noted that Utley was back on track in terms of his good attendance. In fact, some of the comments about Utley's attendance include the word "perfect."

The Respondent's evaluation form also included a category, "team and individual effort." In this area, Ricco from 2003 forward commented that Utley's teamwork has always been one of

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<sup>&</sup>lt;sup>60</sup> Utley's performance evaluations are contained in GC Exh. 36 and cover calendar years 2000–2009, but only up to around January or February. From 2003 until 2005, the Respondent utilized a 5-point evaluation scheme with "1" being poor; "5" being excellent; and "3" was average. From 2003 on, the Respondent employed a three point criteria—below, meets, and exceeds. It shall be noted that GC Exh. 36 actually included Utley's evaluations for 2000, 2001, 2002, 2003, 2006, 2007, 2008, and 2009. There was no evaluation produced for calendar 2004.

his best attributes, that he would help out (in the plant) "wherever help is needed," no questions asked. Ricco noted that Utley was a very hard worker and one not afraid to get his hands dirty. In 2005, Ricco noted that he never doubted Utley's work ethic, he is constantly staying busy by working on other machines when his is running all right; Utley works well with everyone on the floor, that he could count on Utley to give 100 percent effort into his job.

In 2006, Ricco stated that Utley has always been a team player when something needs to get done, that he never had or would question Utley's offers, that his (Ricco's) job would be easier if everyone had Utley's work ethic.

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In 2007, Ricco commented that Utley has always been a reliable employee, he was prompt and ready to work on a regular basis, in spite of the roller coaster" nature of that year—employment-wise—for Utley.

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In 2008, Ricco again commenting in the team and individual effort category, wrote that Utley always gave a "solid effort" on the floor; when others ask for help he will try to help, when he has prepared his own machine for his upcoming orders, he tries to prepare other machines as well.

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In January 2009,<sup>61</sup> Ricco stated that Utley's efforts do not go unnoticed, he is a "very" reliable employee who tries his best. Noting that Utley did get "down" when something did not go right or smoothly and his work suffered, Ricco said, nonetheless, after his return to work he noticed improvement; Utley had handled advice and suggestions with much less resistance as he once had; Utley's outlook seemed to improve. Ricco graded him a "meets" in this area.

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After reviewing Utley's written evaluations, admittedly an exercise in subjectivity, I came to the conclusion that Utley, while not a stellar "nuts and bolts" adjuster, was to be sure an employee who was regarded by all of his supervisors as a good employee with a stellar work attitude, a person who gave his all to the job, was helpful to his workmates with whom he got along well. It seems that on balance the Respondent, even with some performance issues, valued him and thought he was worth retaining as late as the first week of February 2009, about the time he went to Sellhausen about the break issue.

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This view is buttressed by the Respondent's having called him back to work in January 2009 from a 3-month recuperation from his accident. Furthermore, when the Respondent discontinued its third shift-operations in January, Utley was assigned to a second-shift operator position. This, of course, not only is consistent with the record testimony that adjusters were highly valued, and were not being considered for layoffs but also is testament to Utley's work as an employee. For certainly if Utley was so deficient in his work skills and abilities and had a "bad attitude" to boot, the Respondent had ample opportunity and more importantly the authority to get rid of him. However, it chose not to do this until he sought the assistance of the Union and complained about Ricco in early February 2009.

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This brings us to Utley's initial layoff on February 20, 2009, the news of which was rudely delivered to him by Ricco. According to Stelly (and Utley), Theime told them that Utley's

<sup>&</sup>lt;sup>61</sup> It should be recalled that while the 2009 evaluation is dated January 17, 2009, it seems that Utley and Ricco met to discuss its contents on February 19, 2009, the day before Utley was laid off.

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seniority—the least of the BOE adjusters—was the reason for his layoff at the time; evidently, nothing much more was said by Theime, 62 except there was not enough work.

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Finally, we come to the management meeting of March 2, about 2 weeks after Utley's initial layoff, whereat the decision to terminate Utley was made. A few observations about the meeting and its participants are in order. First Bezoenik testified that prior to the meeting he, the ultimate decision maker, had already made up his mind to terminate Utley and was only convening the meeting with the managers to be sure he was making the right decision. Second, the meeting was called not to discuss employee layoffs in general in view of the economic problems extant at the time, but only Utley's layoff.<sup>63</sup> Third, not one of the managers at this meeting ever had any direct supervisory role over Utley at any time during his career with the Company. Bezoenik, the plant manager, essentially worked the first shift and at best had to rely on the input of other supervisors and managers to make decisions affecting line employees, especially on second and third shifts. Rewolinski testified that he had no operational role as the vice president of financing. Schallert was a relatively recent hire as the head of human resources and had no direct knowledge of Utley aside from what could be discerned from his performance evaluations. Theime had just assumed the head of the folding department in January 2009 and worked the first shift, so she also had no firsthand knowledge of Utley's employment record and in fact, if she is to be believed, had only recently in January 2009, undertaken a revampment of the evaluation process upon assuming the folding department head position.

At the meeting, Bezoenik asked for input from the gathered managers, essentially to justify his termination decision. Significantly, Schallert said that Utley's evaluations were not that bad, an understatement in my view.<sup>64</sup>

So, on balance, it was Theime's input that seemingly sealed Utley's fate. And it is clear from her testimony that she received information about Utley's purported problems with receiving constructive criticism, as she termed it, from Ricco who told her Utley was uncomfortable with him and became irritated (agitated) if he (Ricco) tried to assist him, that Utley could not take constructive criticism. Theime admitted that none of the managers at the March 2 meeting reviewed any of Utley's evaluations dealing with his job performance before reaching the decision to terminate him. Thus, to me, it was clearly Ricco's animus against Utley's exercise of his Section 7 rights that shaped and influenced his negative comments about Utley to upper management and comprised the "attitude" part of the Respondent's decision to terminate him. In my view, the operative part of Utley's (bad) attitude lay in his going to the Union to complain about or seek clarification of the break issue presented by Ricco.

<sup>&</sup>lt;sup>62</sup> I have credited Stelly's version of his and Utley's meeting with Theime to discuss Utley's just-announced layoff. Actually, Theime did not dispute this testimony.

<sup>&</sup>lt;sup>63</sup> I note at this juncture that when Bezoenik testified to this point, my suspicions were aroused. I was moved to comment that this was a meeting for a one-man downsize. I note also that in spite of the parlous economic conditions, the Respondent evidently had plans afoot to hire other adjusters at about the time it was deciding to terminate Utley. This was suspicious in my mind as I heard Bezoenik's testimony.

<sup>&</sup>lt;sup>64</sup> I took notice of Schallert's demeanor on the witness stand, and he appeared uncomfortable and unsure in testifying about the whole ordeal with Utley. I also note that Schallert confirmed Utley's testimony that he did not provide him with a requested termination letter setting out the reasons for his termination. Utley testified that he was told by Schallert that his skills, abilities, and "attitude" and the direction of the Company were the reasons for his discharge.

Little more need be said in my view. The ineluctable conclusion in my view again is that the Respondent in large, if not total measure, relied on Ricco's tainted input concerning Utley's retention. As I have determined previously, Ricco interfered with Utley's (and other employees') Section 7 rights, but specifically Utley's seeking the assistance of his Union regarding the break issue.

I would find and conclude that the Respondent's initial layoff, as well as the final termination of Utley, was tainted by Ricco's unlawful misconduct. Ricco's negative comments to Theime and thus to Bezoenik, derived from his animus toward Utley's exercise of rights guaranteed him under the Act. The Respondent here relied upon Ricco's irredeemably tainted and unlawful conduct and violated the Act as a consequence.<sup>65</sup>

## Conclusions of Law

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- 1. The Respondent, Western States Envelope Company, is an employer engaged in commerce within the meaning of Section 2(2), (6), and(7) of the Act.
- 2. The Union, Employees of Western States Envelope Company Union, is a labor organization within the meaning of Section 2(5) of the Act.
  - 3. By threatening employees with unspecified reprisals if they sought assistance from the Union concerning and regarding their working conditions, the Respondent has violated Section 8(a)(1) of the Act.

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4. By interrogating employees as to whether they sought assistance from the Union concerning and regarding their working conditions, the Respondent has violated Section 8(a)(1) of the Act.

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5. By laying off and then terminating its employee George Utley because he assisted the Union and engaged in concerted protected activities and to discourage employees from engaging in these activities, the Respondent violated Section 8(a)(3) and (1) of the Act.

6. The Respondent has not violated the Act in any other manner and respect.

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7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Respondent's witnesses, mainly first-shift Supervisor Tetzlaff and assistant first-shift Supervisor Kurcz and have determined that while credible as such, both men had little or no direct supervisory relationship with Utley, and they both made no formal input for purposes of Utley's evaluations to management. Accordingly, I view their testimony of little value which, in all candor, seemed to be of the make-weight variety. Clearly, on this record, no one on the management team consulted with them or utilized any information they testified to in deciding to lay off and terminate Utley.

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# The Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies.

Having found that the Respondent discriminatorily laid off and terminated George Utley, I shall recommend that the Respondent offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of his layoff to the date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>66</sup>

#### ORDER

The Respondent, Western State Envelope Company, Butler, Wisconsin, its officers, agents, successors, and assigns, shall

#### 1. Cease and desist from

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- (a) Threatening its employees with unspecified reprisals if the employees seek the assistance of the Employees of Western States Envelope Company Union (the Union) regarding and concerning their working conditions.
  - (b) Interrogating its employees as to whether they have sought assistance from the Union regarding and concerning their working conditions.
  - (c) Laying off and discharging or otherwise disciplining its employees, because they seek the assistance of or assist the Union or engage in concerted activities, to discourage its employees from engaging in such activities.
  - (d) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.
    - 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) Within 14 days from the date of this Order, offer George Utley reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.
- (b) Make George Utley whole for any loss of earnings and any other benefits suffered as a result of the discrimination against him in the manner set forth in the Remedy section of the decision.

<sup>66</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against him in any way. (d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order. (e) Within 14 days after service by the Region, post at its facility in Butler, Wisconsin, copies of the attached notice marked "Appendix."67 Copies of the notice, on forms provided by the Regional Director for Region 30, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 20, 2009. (f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply. Dated, Washington, D.C. March 19, 2010 Earl E. Shamwell Jr. Administrative Law Judge

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<sup>&</sup>lt;sup>67</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

JD-16-10 Butler, WI

### **APPENDIX**

#### NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union Choose representatives to bargain with us on your behalf Act together with other employees for your benefit and protection Choose not to engage in any of these protected activities

WE WILL NOT threaten any of you with unspecified reprisals if you seek assistance from the Employees of Western States Envelope Company Union (the Union) regarding and concerning their working conditions.

WE WILL NOT interrogate any of you as to whether you have sought assistance from the Union regarding and concerning your working conditions.

WE WILL NOT lay off or terminate or otherwise discipline you because you assist or seek assistance from the Union or engage in concerted activities, or to discourage any of you from engaging in these activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the National Labor Relations Act.

WE WILL, within 14 days from the date of the Board's Order, offer George Utley reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make George Utley whole for any loss of earnings and any other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

		WESTERN STATES ENVELOPE COMPANY (Employer)	
Dated	Ву		
		(Representative)	(Title)

JD-16-10 Butler, WI

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: <a href="https://www.nlrb.gov">www.nlrb.gov</a>.

310 West Wisconsin Avenue, Federal Plaza, Suite 700 Milwaukee, Wisconsin 53203-2211 Hours: 8 a.m. to 4:30 p.m. 414-297-3861.

## THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 414-297-1819.

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# UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES

# WESTERN STATES ENVELOPE COMPANY

Order

and	Case 30-CA-18296
GEORGE UTLEY, an individual	
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